No. 05-1157
Title: Credit Suisse Securities (USA) LLC, fka Credit Suisse First Boston LLC, et al., Petitioners
v.
Glen Billing, et al.
Docketed: March 13, 2006
Lower Ct: United States Court of Appeals for the Second Circuit
Case Nos.: (03-9284, 03-9288)
Decision Date: September 28, 2005
Rehearing Denied: January 12, 2006
Questions Presented

~~Date~~	~~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~~
Mar 8 2006	Petition for a writ of certiorari filed. (Response due April 12, 2006)
Apr 11 2006	Motion for leave to file amici brief filed by Securities Industry Association, et al.
Apr 12 2006	Waiver of right of respondents Glen Billing, et al. to respond filed.
Apr 12 2006	Motion for leave to file amicus brief filed by National Association of Securities Dealers, Inc.
Apr 12 2006	Motion for leave to file amicus brief filed by NYSE Group, Inc.
Apr 12 2006	Brief of respondent Milton Pfeiffer in opposition filed.
Apr 18 2006	DISTRIBUTED for Conference of May 11, 2006.
Apr 19 2006	Response Requested . (Due May 19, 2006)
Apr 19 2006	Reply of petitioner Credit Suisse First Boston Ltd., et al. to brief in opposition of Milton Pfieffer filed. (Distributed)
May 17 2006	Order extending time to file response to petition to and including May 26, 2006.
May 26 2006	Brief of respondents Glen Billing, et al. in opposition filed. (Distributed)
May 30 2006	DISTRIBUTED for Conference of June 15, 2006.
May 30 2006	Reply of petitioners to brief in opposition of respondent Glen Billing filed. (Distributed)
Jun 12 2006	Supplemental brief of petitioners Credit Suisse First Boston Ltd., et al. filed. (Distributed)
Jun 14 2006	Supplemental brief of respondents Glen Billing, et al. filed. (Distributed)
Jun 19 2006	The Solicitor General is invited to file a brief in this case expressing the views of the United States. The Chief Justice took no part in the consideration or decision of this petition.
Nov 9 2006	Brief amicus curiae of United States filed.
Nov 21 2006	DISTRIBUTED for Conference of December 7, 2006.
Nov 21 2006	Supplemental brief of respondents Glen Billing, et al. filed. (Distributed)
Nov 27 2006	Supplemental brief of petitioners Credit Suisse First Boston Ltd., et al. filed. (Distributed)
Dec 7 2006	Motion for leave to file amici brief filed by Securities Industry Association, et al. GRANTED. The Chief Justice took no part in the consideration or decision of this motion.
Dec 7 2006	Motion for leave to file amicus brief filed by NYSE Group, Inc. GRANTED. The Chief Justice took no part in the consideration or decision of this motion.
Dec 7 2006	Motion for leave to file amicus brief filed by National Association of Securities Dealers, Inc. GRANTED. The Chief Justice took no part in the consideration or decision of this motion.

Dec 7 2006	Petition GRANTED. The Chief Justice took no part in the consideration or decision of this petition.
Jan 17 2007	SET FOR ARGUMENT ON Tuesday, March 27, 2007.
Jan 22 2007	Brief amicus curiae of United States supporting vacatur filed.
Jan 22 2007	Motion for leave to file amicus brief filed by National Association of Securities Dealers, Inc.
Jan 22 2007	Motion for leave to file amicus brief filed by Securities Industry and Financial Markets Association, et al.
Jan 22 2007	Joint appendix filed.
Jan 22 2007	Brief of petitioners Credit Suisse Securities (USA) LLC, fka Credit Suisse First Boston LLC, et al. filed.
Jan 22 2007	Motion for leave to file amicus brief filed by W.R. Hambrecht + Co., LLC.
Jan 22 2007	Motion for leave to file amicus brief filed by NYSE Group, Inc.
Jan 22 2007	Motion for leave to file amicus brief filed by Washington Legal Foundation.
Feb 2 2007	Motion for divided argument filed by respondent Milton Pfeiffer.
Feb 5 2007	CIRCULATED.
Feb 14 2007	Record received from U.S.D.C. for Southern District of New York. (2 boxes)
Feb 16 2007	Motion for leave to file amicus brief filed by Washington Legal Foundation GRANTED. The Chief Justice took no part in the consideration or decision of this motion.
Feb 20 2007	Motion for leave to file amici brief filed by Securities Industry and Financial Markets Association, et al. GRANTED. The Chief Justice ~~took no part in~~ the consideration or decision of this motion.
Feb 20 2007	Motion for leave to file amicus brief filed by National Association of Securities Dealers, Inc. GRANTED. The Chief Justice took no part in the consideration or decision of this motion.
Feb 20 2007	Motion for leave to file amicus brief filed by NYSE Group, Inc. GRANTED. The Chief Justice took no part in the consideration or decision of this motion.
Feb 20 2007	Motion for leave to file amicus brief filed by W.R. Hambrecht + Co., LLC GRANTED. The Chief Justice took no part in the consideration or decision of this motion.
Feb 21 2007	Opposition of respondent Billing to motion of respondent Pfeiffer for divided argument filed.
Feb 21 2007	Pfeiffer's reply to Billing's opposition to motion.
Feb 23 2007	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
Feb 26 2007	Brief of respondents Glen Billing, et al. filed. (Distributed)
Feb 26 2007	Brief of respondent Milton Pfeiffer filed. (Distributed)
Feb 26 2007	Brief amicus curiae of New York filed. (Distributed)
Feb 26 2007	Brief amicus curiae of American Antitrust Institute filed. (Distributed)
Mar 5 2007	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED. The Chief Justice took no part in the consideration or decision of this motion.
Mar 5 2007	Motion for divided argument filed by respondent DENIED. The Chief Justice took no part in the consideration or decision of this motion.
Mar 5 2007	Supplemental Joint appendix filed. (Distributed)

Mar 14 2007	Record received from U.S.C.A. for 2nd Circuit. (1 box)
Mar 14 2007	Reply of petitioners Credit Suisse Securities (USA) LLC, fka Credit Suisse First Boston LLC, et al. filed. (Distributed)
Mar 19 2007	Having been advised by Justice Kennedy that he now realizes that he should have recused himself from participation in this case, and does now recuse himself, the Court vacates its order of Thursday, December 7, 2006. The Court has reconsidered the petition for certiorari, and the petition is granted. The Chief Justice and Justice Kennedy have not participated in the vote to withdraw the order of December 7, 2006, or in the instant reconsideration of the petition for certiorari.
Mar 23 2007	The Chief Justice is no longer recused in this case.
Mar 27 2007	Argued. For petitioners: Stephen M. Shapiro, Washington, D.C.; and Paul D. Clement, Solicitor General, Department of Justice, Washington, D.C. (for the United States, as amicus curiae.) For respondents: Christopher Lovell, New York, N.Y.

Supreme Court, U.S.
FILED

051157 MAR 8 - 2006

OFFICE OF THE CLERK

No. 05-

In the Supreme Court of the United States

CREDIT SUISSE FIRST BOSTON LTD., ET AL.,

Petitioners,

v.

GLEN BILLING, ET AL.,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

ROBERT B. MCCAW
LOUIS R. COHEN
ALI M. STOEPPELWERTH
FRASER L. HUNTER, JR.
NOAH A. LEVINE
WILMER CUTLER PICKERING
HALE & DORR LLP
399 Park Avenue
New York, New York 10022
(212) 230-8800
Attorneys for Petitioner Citigroup Global Markets Inc.

STEPHEN M. SHAPIRO
Counsel of Record
KENNETH S. GELLER
TIMOTHY S. BISHOP
MAYER, BROWN, ROWE & MAW LLP
1909 K Street, N.W.
Washington, D.C. 20006
(202) 263-3000
Attorneys for Petitioner Merrill Lynch, Pierce, Fenner & Smith Incorporated

Counsel for Petitioners
[Additional Counsel Listed On Signature Page]

QUESTION PRESENTED

Plaintiffs accuse defendants, 16 of the country's largest underwriters and institutional investors, of a vast antitrust conspiracy to manipulate the aftermarket prices of some 900 technology stocks sold in initial public offerings. The Securities and Exchange Commission, relying on this Court's decisions in *United States* v. *National Ass'n of Securities Dealers*, 422 U.S. 694 (1975), and *Gordon* v. *New York Stock Exchange*, 422 U.S. 659 (1975), informed the courts below that application of the antitrust laws here would conflict with and seriously disrupt its regulation of the securities offering process under the Securities Act of 1933 and Securities Exchange Act of 1934. The district court agreed with the SEC that implied antitrust immunity is required and dismissed the complaints. The court of appeals reversed, ruling that immunity is unavailable because Congress did not specifically consider and decide to immunize one practice challenged in the complaints—tie-in agreements allegedly requiring recipients of stock in an IPO to engage in other transactions.

The question presented is:

Whether, in a private damages action under the antitrust laws challenging conduct that occurs in a highly regulated securities offering, the standard for implying antitrust immunity is the potential for conflict with the securities laws or, as the Second Circuit held, a specific expression of congressional intent to immunize such conduct and a showing that the SEC has power to compel the specific practices at issue.

RULES 14.1 AND 29.6 STATEMENT

In these consolidated cases, respondents (plaintiffs-appellants below) are Mita Aggarwal, Estelle L. Augustine, Tom Barnett, Anupkumar Bhasin, Glen Billing, Joe Braswell, Troy Brooks, Anita S. Budich, Thomas E. Burke, Don K. Burris, Louis Capolino, Jerry Cobb, Max Cohen, Ray L. Cox, Buddy Dukeman, Eileen Dukeman, Joyce Dunn, David Federico, Joe Goldgrab, Robert Grovich, Bob Harper, David Hoffman, Bruce J. Jiorle, H. Wayne Jones, Susan Katz, Glenn Kerr, Irving Lassoff, Roderick Lau, Elizabeth Bates Lester, James W. Lester, Solomon Lissanu, Raymond Litwin, Local 144 Nursing Home Pension Fund, Bill Lucia, Michele Lucia, Robert Malafronte, Binh Nguyen, David Pazarella, Demetrios Petratos, Milton Pfeiffer, Carlos Reeberg, Hans Reihl, Norman Ross, Rachel Schwartz, Mark Sculnick, Edward Seltzer, Kenneth Shives, Farideh Sigari, Efriam Simcha, Henry Sklanowsky, Robert Tarantino, Enrico Tavani, Robert H. Thomas, Anthony Voto, Heinz Wahl, Philip Warner, Matthew Weiner, Michael Weiss, Ross Wiczer, Bert Zauderer, Deming Zhous.

Petitioners (defendants-appellees below) are:

Bear, Stearns & Co. Inc. The Bear Stearns Companies Inc., a publicly held corporation, is the parent company of Bear, Stearns & Co. Inc. No other publicly held corporation owns 10% or more of the stock of Bear, Stearns & Co. Inc.

Citigroup Global Markets Inc. Citigroup Global Markets Inc. (formerly known as Salomon Smith Barney Inc.) is a wholly owned subsidiary of Citigroup Financial Products Inc. (formerly known as Salomon Brothers Holding Company Inc.), which is a wholly owned subsidiary of Citigroup Global Markets Holdings Inc. (f/k/a Salomon Smith Barney Holdings Inc.) which is a wholly owned subsidiary of Citigroup Inc.

Comerica, Inc. Comerica, Inc. has no parent corporation and no publicly held corporation owns 10% or more of its stock.

Credit Suisse Securities (USA) LLC (formerly named Credit Suisse First Boston LLC). Credit Suisse Securities (USA) LLC is a wholly owned subsidiary of Credit Suisse (USA), Inc. (formerly named Credit Suisse First Boston (USA), Inc.) a public reporting company that has certain publicly traded securities and which is a wholly owned subsidiary of Credit Suisse Holdings (USA), Inc. (formerly named Credit Suisse First Boston, Inc.). Credit Suisse Holdings (USA), Inc. is a jointly owned subsidiary of Credit Suisse Group, the shares of which are publicly traded on the Swiss Stock Exchange, and Credit Suisse (formerly named Credit Suisse First Boston), which itself is a wholly owned subsidiary of Credit Suisse Group. Except as described above, Credit Suisse Securities (USA) LLC has no subsidiaries or affiliates that are publicly held, and no publicly held corporation owns 10% or more of the stock of Credit Suisse Securities (USA) LLC.

Deutsche Bank Securities Inc. Deutsche Bank Securities Inc. (formerly known as Deutsche Banc Alex. Brown Inc.) ("DBSI") has the following corporate parents: Deutsche Bank AG, Taunus Corporation, and DB U.S. Financial Markets Holding Corporation. Other than the aforementioned corporate parents, there is no publicly held corporation that owns 10% or more of DBSI's stock.

Fidelity Distributors Corp.; Fidelity Brokerage Services LLC; Fidelity Investments Institutional Services Co., Inc. Fidelity Distributors Corp. and Fidelity Investments Institutional Services Co., Inc. are direct subsidiaries of FMR Corp., a Delaware corporation that is privately held. Fidelity Brokerage Services LLC is wholly owned by Fidelity Global Brokerage Group, Inc., an entity that is, in turn, wholly owned by FMR Corp., a Delaware corporation that is privately held. In addition, other entities wholly owned by FMR

Corp. have contractual relationships to distribute, administer, manage, and advise the Fidelity family of mutual funds.

Goldman, Sachs & Co. Goldman, Sachs & Co. is a subsidiary of The Goldman Sachs Group, Inc., which owns 10% or more of its partnership units. No other publicly held company owns 10% or more of the stock of Goldman, Sachs & Co.

The Goldman Sachs Group, Inc. The Goldman Sachs Group, Inc. has no parent corporations and no publicly held companies own 10% or more of its common stock.

Janus Capital Management LLC. Janus Capital Management LLC is owned by Janus Capital Group Inc., the shares of which are publicly traded on the New York Stock Exchange. No other publicly held company owns 10% or more of the stock of Janus Capital Management LLC.

J.P. Morgan Securities Inc. J.P. Morgan Securities Inc. is a wholly owned subsidiary of JPMorgan Chase & Co., a publicly traded entity.

Lehman Brothers Inc. Lehman Brothers Inc. is a wholly-owned subsidiary of Lehman Brothers Holdings Inc., a Delaware corporation that is a publicly-held reporting company under the Securities Exchange Act of 1934.

Merrill Lynch, Pierce, Fenner & Smith Incorporated. Merrill Lynch & Co., Inc. is the parent company of Merrill Lynch, Pierce, Fenner & Smith Incorporated. Merrill Lynch & Co., Inc. is a publicly held company whose shares are traded on the New York Stock Exchange. No other publicly held company owns 10% or more of the stock of Merrill Lynch, Pierce, Fenner & Smith Incorporated.

Morgan Stanley & Co. Incorporated. Morgan Stanley & Co. Incorporated is a wholly owned subsidiary of Morgan Stanley.

Robertson Stephens, Inc. Robertson Stephens, Inc.'s ultimate parent company, Bank of America Corporation, issues shares registered with the Securities and Exchange Commission for public trading. No other parent companies, subsidiaries or affiliates of Robertson Stephens, Inc. issues shares to the public. No other publicly held company owns 10% or more of the stock of Robertson Stephens, Inc.

Van Wagoner Capital Management, Inc. Van Wagoner Capital Management, Inc. has no parent corporations and no publicly held companies own 10% or more of its common stock.

Van Wagoner Funds, Inc. Van Wagoner Funds, Inc., a mutual fund entity, has no parent corporations. The following publicly held entities own 10% or more of any of its series of shares: (i) Van Wagoner Small Cap Growth Fund: Charles Schwab & Co., Inc. and National Financial Services Corp.; (ii) Van Wagoner Emerging Growth Fund: Charles Schwab & Co., Inc. and National Financial Services Corp. Charles Schwab & Co., Inc. and National Financial Services Corp. holds such shares as broker-dealers on behalf of their underlying customers. No other publicly held company owns 10% or more of the stock of Van Wagoner Funds, Inc.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners, leading investment banking and asset management firms, respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The amended opinion of the court of appeals (App., *infra*, 1a-71a) is reported at 426 F.3d 130. The opinion of the district court (App., *infra*, 72a-122a) is reported at 287 F. Supp. 2d 497.

JURISDICTION

The judgment of the court of appeals was entered on September 28, 2005. The court of appeals issued an amended opinion on October 26, 2005. Petitioners filed a timely petition for rehearing en banc on November 2, 2005, which was denied on January 12, 2006. App., *infra*, 123a. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED

Relevant provisions of the Sherman Act, 15 U.S.C. § 1, *et seq.*, Robinson-Patman Act, 15 U.S.C. § 13, Securities Act, 15 U.S.C. § 77a, *et seq.*, Securities Exchange Act, 15 U.S.C. § 78a, *et seq.*, and Securities and Exchange Commission guidance are reproduced at App., *infra*, 208a-233a.

STATEMENT

Plaintiffs are purchasers of stock issued by internet and technology companies during the market "bubble" of the late 1990s. Demanding treble damages, plaintiffs' class action complaint in *Billing* alleges that ten leading investment banks conspired to impose anticompetitive charges on prospective purchasers of shares of stock in some 900 initial public offerings (IPOs) of equity securities and to inflate the price of those securities in the aftermarket. In addition to challenging

this conduct in hundreds of separate actions under the federal securities laws, plaintiffs here claim that the conduct violated section 1 of the Sherman Act, 15 U.S.C. § 1, and various state antitrust laws. App., *infra*, 17a-18a; Consolidated Amended Class Action Complaint ("Am. Compl.") Exh. A.

A separate antitrust class action complaint in *Pfeiffer* v. *Credit Suisse First Boston* is based on the same alleged conduct. *Pfeiffer* alleges that underwriters imposing anticompetitive charges on IPO allocants and institutional investors paying those charges engaged in "commercial bribery" in violation of the Robinson-Patman Act, 15 U.S.C. § 13(c), and that this conduct inflated the prices of stocks. App., *infra*, 18a-20a; *Pfeiffer* Compl. ¶¶ 2-4, 75, 82, 84, 115.

A. Plaintiffs' Antitrust Complaints Challenge Commonplace Underwriter Practices At The Core Of SEC Regulatory Authority.

Plaintiffs' complaints challenge "firm commitment" underwriting—by far "the most prevalent type of underwriting"—in which investment banks form a syndicate to purchase shares from the issuer and then resell those shares to an initial group of institutional and retail investors. 1 LOUIS LOSS & JOEL SELIGMAN, SECURITIES REGULATION 327 (3d ed. 1998). Firm commitment underwritings are central to capital formation, raising many billions of dollars each year for U.S. businesses. In a firm commitment IPO—which the Securities and Exchange Commission (SEC) has "plenary authority to regulate" under the federal securities laws—a lead manager assumes responsibility for selling most of the offering. Other syndicate members share the risk of the offering, collect a portion of the underwriting fees, and often receive a portion of the offering to allocate to retail customers. See App., *infra*, 4a-6a, 87a-90a; 1 LOSS & SELIGMAN, *supra*, at 327-346.

An integral part of this collaborative process is the "road show" during which underwriters "build the book" for dis-

tributing the offering. App., *infra*, 6a-7a, 74a. In the weeks before the IPO, company officials and underwriters meet with potential investors, informing them about the issuer and collecting information necessary to determine the appropriate size, price, and allocation of the offering. 1 LOSS & SELIGMAN, *supra*, at 341; *Commission Guidance Regarding Prohibited Conduct in Connection with IPO Allocations*, Release No. 34-51500, 70 Fed. Reg. 19672, 19674-19675 (Apr. 13, 2005), App., *infra*, 223a-225a ("*IPO Allocations Release*"). Underwriters' discussions with potential IPO buyers during this process, the SEC has explained, legitimately include "[w]hether the customer intends to hold the securities as an investment (be a long-term holder), or, instead, expects to sell the shares in the immediate aftermarket (also known as 'flipping')," "[t]he customer's desired long-term future position in the security," and the "prices at which the customer might accumulate that position." *IPO Allocations Release*, App., *infra*, 225a; see App., *infra*, 7a, 90a-93a, 133a-134a.

Plaintiffs launch an "indiscriminate assault" on this system of capital formation. App., *infra*, 91a. Plaintiffs find an antitrust conspiracy in underwriters' joining together in syndicates to share the risk of an offering. Am. Compl. ¶¶ 37-38. They complain that syndicate members made inquiries "concerning the number of shares [a customer] would be willing to purchase in the aftermarket and the prices such person would be willing to pay." *Id.* ¶¶ 45, 54. They take issue with syndicate members sharing the identities of IPO allocants and with the division of allocation responsibilities among syndicate members. *Id.* ¶¶ 39, 56. They seek to infer conspiratorial conduct from underwriters' participation in registered stock exchanges, such as the New York Stock Exchange, and other self regulatory organizations (SROs), such as the National Association of Securities Dealers (NASD). *Id.* ¶¶ 46-47. And they challenge underwriters' practice of favoring long-term investors over "flippers" in the allocation of IPO shares. *Pfeiffer* Compl. ¶¶ 64-65, 81. The SEC explained in an

amicus brief, and the district court held, that each of these activities is "expressly permitted under the current securities regulatory regime." App., *infra*, 92a-93a.

Plaintiffs also allege that defendant underwriters conspired to require IPO purchasers to pay "anticompetitive charges" in addition to the IPO price. Those "charges" purportedly included "tie-in" or "laddering" obligations—requiring purchasers of shares in an IPO also to commit to purchase the security in the aftermarket at escalating prices, to purchase the issuer's securities in subsequent offerings, or to purchase other less attractive securities—and agreements that IPO allocants would pay excessive commissions on trades in other securities. App., *infra*, 17a-18a, 73a-74a; Am. Compl. ¶¶ 1-7. Plaintiffs assert that this alleged conduct, along with underwriters' influencing their analysts "to issue positive reports," inflated the price of the IPO stocks in the aftermarket. App., *infra*, 18a; Am. Compl. ¶¶ 7, 60. Plaintiffs who received allocations of the offering at the issue price assert that they were injured by having to pay additional charges; plaintiffs who purchased stock in the aftermarket assert they were injured because they paid an inflated market price. App., *infra*, 18a-20a, 74a-75a; Am. Compl. ¶ 79; *Pfeiffer* Compl. ¶¶ 5, 125-126.

The conduct alleged in these cases is also the subject of 310 class actions brought under the securities laws. *In re Initial Public Offering Sec. Litig.*, 241 F. Supp. 2d 281 (S.D.N.Y. 2003); see also *id.*, 227 F.R.D. 65 (S.D.N.Y. 2004) (certifying classes), Rule 23(f) appeal pending (2d Cir.) (No. 05-3349). Those suits—brought by many of the same plaintiffs' lawyers involved in these antitrust cases—allege an "industry-wide scheme" characterized by the same "tie-in" agreements, payment of additional compensation to underwriters, and optimistic analyst reports that are challenged by the antitrust plaintiffs. Plaintiffs in the securities cases allege that this conduct violated section 10(b) of the Securities Exchange Act and Rule 10b-5 by manipulating the market for

IPO stocks, and section 11 of the Securities Act by making untrue statements and omissions in registration statements. 241 F. Supp. 2d at 293-296.

B. The SEC Explained That These Antitrust Suits Conflict With The Exercise Of Its Regulatory Authority And So Are Barred By This Court's Implied Immunity Precedents.

A "detailed regulatory scheme," such as that created by the Securities Act and the Securities Exchange Act, "ordinarily raises the question whether the regulated entities are not shielded from antitrust scrutiny altogether by the doctrine of implied immunity." *Verizon Communications, Inc.* v. *Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 406 (2004), citing *United States* v. *National Ass'n of Sec. Dealers*, 422 U.S. 694 (1975), and *Gordon* v. *New York Stock Exch.*, 422 U.S. 659 (1975). The defendant underwriters accordingly moved to dismiss the complaints.

Defendants relied on a trilogy of cases considering the application of the antitrust laws to the securities industry: *Silver* v. *New York Stock Exch.*, 373 U.S. 341 (1963); *Gordon*; and *NASD*. In those cases the Court held that the delicate balance of the countervailing interests at play in this industry is best achieved through finely-tuned securities regulation rather than the blunt application of the antitrust laws. Accordingly, those decisions establish that immunity will be implied when either (i) Congress has given the SEC direct authority over the challenged conduct and the Commission has exercised that authority or (ii) the conduct at issue is subject to a pervasive regulatory scheme. In either case, immunity will be implied if application of the antitrust laws would conflict with, rather than merely supplement, the relevant regulatory regime—a finding that is particularly likely where the SEC's regulation has sought to strike a balance between competition and other statutory objectives. See *Gordon*, 422 U.S. at 690-691; *NASD*, 422 U.S. at 729. The ultimate purpose of the

doctrine is "to avoid the real possibility of judgments conflicting with the agency's regulatory scheme 'that might be voiced by courts exercising jurisdiction under the antitrust laws.'" *Trinko*, 540 U.S. at 406, quoting *NASD*, 422 U.S. at 734.

Despite the unambiguous standards laid down in this Court's precedents, the SEC and the Antitrust Division of the Department of Justice (DOJ) were hopelessly conflicted over the proper disposition of the motions to dismiss. Each submitted amicus briefs in the courts below on opposite sides, the SEC arguing for and the DOJ against immunity. The SEC explained that "[t]he IPO allocation and commission practices challenged fall within the very heart of the Commission's regulatory authority over underwriting syndicates" and "are comprehensively regulated." Mem. Amicus Curiae of SEC to the district court, at 1 (Dec. 20, 2002), App., *infra*, 127a. Immunity is required under this Court's decisions, the SEC contended, because "'an antitrust suit would conflict with the operation of [this] regulatory scheme.'" Post-Argument Letter Br. of SEC to Second Circuit, at 4 (Mar. 21, 2005), App., *infra*, 193a, quoting *Gordon*, 422 U.S. at 688.

The SEC's brief described its plenary authority to regulate "the offering process under the Securities Act," including communications during road shows (App., *infra*, 132a; 15 U.S.C. § 77e; 17 C.F.R. §§ 230.134, .137-.139, .460-.461); its authority to "permit or prohibit manipulative acts in the purchase and sale of securities under the Exchange Act," including manipulation during an IPO and price stabilization following an offering, addressed in sections 9(a) and 10(b) of the Exchange Act and Regulation M (App., *infra*, 132a, 135a, 149a; 15 U.S.C. §§ 78i(a), 78j(b); 17 C.F.R. §§ 242.100-.105); and its oversight of the NASD, which "comprehensively regulates syndicate practices pursuant to rules that are formally reviewed and approved by the Commission." App., *infra*, 136a. The Commission explained that it is required, in exercising these comprehensive powers, to

consider effects on competition, but is not obliged to take actions that are "'the least anti-competitive manner of achieving a regulatory objective.'" *Id.* at 130a-131a, quoting S. REP. No. 94-75, at 13 (1975), 1975 U.S.C.C.A.N. 179, 191; see 15 U.S.C. §§ 77b(b), 78o-3(b)(9), 78w(a)(2).

Most of the joint conduct by syndicate members challenged in these suits as an antitrust conspiracy "is necessary to the offering process" and "permitted under the Commission's rules." App., *infra*, 127a. To the extent the alleged tie-in conduct might violate the securities laws, the SEC is "actively pursuing" a "comprehensive regulatory respons[e]." *Id.* at 127a-128a. The Commission and the NASD investigated IPO allocation practices following the market bubble and have filed and settled actions against several investment banks. *Id.* at 137a-138a. Each of those actions alleged that the investment bank engaged in one or more of the IPO allocation practices challenged here, involved alleged violations of Regulation M or NASD Conduct Rule 2110, and settled without an admission or denial of liability. *E.g.*, *SEC* v. *Credit Suisse First Boston* (Jan. 22, 2002), www.sec.gov/litigation/litreleases/lr17327.htm; see App., *infra*, 196a. In addition, the SEC has established a blue-ribbon panel to recommend rule changes. *Ibid.* To date the SEC has proposed amendments to Regulation M prohibiting underwriters from receiving consideration from IPO customers above the offering price of a security. Release No. 34-50831, 69 Fed. Reg. 75774 (Dec. 17, 2004). It also is reviewing proposed SRO rule changes addressing "quid pro quo allocations" of IPO stock. Release No. 34-50896, 69 Fed. Reg. 77804 (Dec. 28, 2004). See App., *infra*, 137a-139a, 194a-197a.

In the exercise of its regulatory authority over public offerings the SEC has engaged in expert line-drawing with respect to the very conduct alleged in this case, of the type that implied immunity is designed to accommodate. Its *IPO Allocations Release* describes fact-intensive distinctions between "legitimate underwriting practices" that "facilitate capital

formation" and unlawful manipulation. App., *infra*, 220a. According to the SEC, the difference between a permissible conversation about aftermarket interest and a potentially impermissible communication linking allocations to aftermarket activity may turn on a few words, or no words at all, in discussions between IPO investors and underwriters. *Id.* at 225a-232a.[1]

Similarly, SEC rules do not "prohibit a firm from allocating IPO shares to a customer because the customer has separately retained the firm for other services" for which "the customer has not paid excessive compensation." Release No. 34-50831, 69 Fed. Reg. at 75785. The difference between customers who traded heavily, generated commissions, and permissibly received allocations in light of their valuable business relationships, and any customers who sought to increase their allocations by paying "excessive" compensation depends on the facts and circumstances of each transaction.

The lines drawn by the SEC are not static. The Commission "continual[ly] adjust[s]" rules in light of "newly emerging or identified problems," "balancing and re-balancing relevant factors to protect investors and the public interest," including balancing "anti-competitive effects" against "countervailing benefits" in a context where the syndicate underwriting system "inherently" raises "substantial antitrust concern." App., *infra*, 190a-192a, 195a. What rules may be

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[1] "Communicating to customers that expressing an interest in buying shares in the immediate aftermarket ('aftermarket interest') or immediate aftermarket buying would help them obtain allocations of hot IPOs" would violate SEC regulations. "However, inquiring as to customers' desired future position in the longer term (for example, three to six months) and the price or prices at which customers might accumulate that position, without reference to immediate aftermarket activity, does not, without more, fall within this violative conduct." *IPO Allocations Release*, App., *infra*, 228a.

adopted in the future with respect to conduct that "could be characterized as a tie-in or laddering" is "impossible to foresee" because it depends on "what future developments in the offering process" and the SEC's "understanding of the public interest and investor protection may require." *Id.* at 191a.

Disagreeing fundamentally with the DOJ's assertion that immunity was unnecessary here, the SEC explained below that the conduct alleged by plaintiffs "may or may not be permissible" under the securities laws, "depending upon the facts." App., *infra*, 156a. It warned that allowing an antitrust jury to review those fine-line distinctions threatens to "discourag[e] useful interactions among participants in the offering process that are permitted under the securities laws" and "over-deter conduct that would serve the interests of the markets and the capital formation process." *Id.* at 193a-194a. The SEC cautioned that IPO participants "should not be subjected to the fear that in interpreting and applying the comprehensive governing body of securities laws rules, they could find themselves not only liable for violating the securities laws, but also in an antitrust treble damages action." *Id.* at 193a. Without immunity, "antitrust concerns will become the predominant considerations in the underwriting process." *Id.* at 194a. And the "*in terrorem* effect" of treble damages will "distort market participant behavior in ways that are harmful to the overall securities markets." *Id.* at 197a.

C. The District Court Dismissed Plaintiffs' Complaints Under This Court's Implied Immunity Precedents.

After carefully analyzing this Court's precedents and the SEC's and DOJ's submissions, the district court held defendants were entitled to immunity because the SEC's "sweeping power" to regulate the specific conduct alleged by plaintiffs creates a "potential conflict with the antitrust laws." App., *infra*, 86a. Judge Pauley also "agree[d] with the SEC's contention that its regulatory authority over the conduct al-

leged" is "pervasive" and should not be undermined by potentially conflicting antitrust claims. *Ibid.*

The district court observed that "much of the conduct" at issue, such as the underwriting syndicate scheme, "is authorized under the current securities regulatory regime." App., *infra*, 86a. In addition, the SEC has broad authority under Exchange Act sections 9(a)(6) and 10(b) to regulate IPO allocation and commission practices. The SEC has actively exercised that authority and is investigating the very practices covered by plaintiffs' complaints. The NASD, over which the SEC has "pervasive regulatory oversight," is likewise considering new rules to deal specifically with that conduct. *Id.* at 87a-88a, 116a-117a. Given Congress's "unique mandate" to the SEC "to balance competition with other market concerns," such as capital formation, and the SEC's "broad power to regulate the conduct at issue," the court concluded that "potential conflicts exist" between "the securities and antitrust regulatory regimes" even as to alleged "activities that are, at the current time, prohibited under both." *Id.* at 94a, 96a. The court thus rejected the view expressed by the DOJ that there is no clear conflict between the securities regulatory regime and these antitrust claims. *Id.* at 119a-120a.

D. The Court Of Appeals Rejected The SEC's Position On Immunity And Reversed.

The court of appeals reversed the district court's decision, making this the *only* case in which the SEC has urged implied immunity and a court has rejected the Commission's position. App., *infra*, 64a-70a. The Second Circuit acknowledged that immunity applies where there are "'potential specific conflicts'" between the antitrust and securities laws or "'pervasive regulation'" under the securities laws. *Id.* at 49a. It labeled the "pervasive regulation" ground of immunity "vague," however, and suggested that it may apply only "where the activities of an SRO, extensively regulated by the

SEC, are challenged as anticompetitive," which is not the case here. *Id.* at 50a.

With respect to "potential specific conflict," the court of appeals held that there is implied immunity only if "Congress contemplated the specific conflict and intended for the antitrust laws to be repealed"—a novel test that comes close to imposing the same showing required for express antitrust immunity. App., *infra*, 57a. In determining whether its new standard was met, the court looked for (1) a legislative history or statutory structure demonstrating Congress's intent to repeal the antitrust laws with respect to the specific challenged conduct; (2) the possibility of conflicting mandates when the "regulatory structure empower[s] an agency to compel action prohibited by the antitrust laws"; (3) the likelihood that application of the antitrust laws would moot a provision of the securities laws; and (4) a "regulatory history permitting, at some point, the challenged anticompetitive conduct." *Id.* at 53a-55a.

The court of appeals acknowledged that "the SEC has unquestionable jurisdiction over the tie-in agreements underlying plaintiffs' complaints" and that the SEC in fact regulates "tie-ins" and "laddering." App., *infra*, 64a-67a. Nevertheless, examining the four factors noted above, it declined to confer implied immunity. It found "no legislative history indicating that Congress intended to immunize anti-competitive tie-in arrangements." It found that the Commission could not "force underwriters to offer tie-in agreements." The court believed that no provision of the securities laws "would be 'rendered nugatory' by application of the antitrust laws" to the alleged tie-in and compensation arrangements. And it found that the SEC has never authorized arrangements that would constitute tie-ins under current SEC guidelines. *Id.* at 64a-66a. The court suggested that on remand a fact-intensive "rule of reason" analysis may be appropriate. *Id.* at 70a.

REASONS FOR GRANTING THE PETITION

This Court should review the Second Circuit's decision "[b]ecause of the vital importance of the question" whether implied antitrust immunity applies where the conduct at issue is heavily regulated by an administrative agency charged with taking competition into account and that agency maintains immunity is "necessary to make [the securities laws] work." *Gordon*, 422 U.S. at 663, 683, 686. The court of appeals' ruling on this recurring question conflicts directly with this Court's decisions.

The SEC, the expert agency charged by Congress with regulating the IPO underwriting process, has advocated immunity from these antitrust actions in the most emphatic terms. The SEC explained that it regulates all of the conduct alleged by plaintiffs. As part of that regulation, it "performs the antitrust function" of taking competition concerns into account, but also, as Congress has mandated, balances other interests such as capital formation and market efficiency. See *Silver*, 373 U.S. at 358. The SEC warned that application of the antitrust laws here will cause serious injury to its regulatory functions, to the operation of public securities markets, and to the investing public. The Second Circuit's rejection of the Commission's view—in an area so central to the Nation's economy and the SEC's expertise—makes this a case of extraordinary public importance.

That the Department of Justice submitted briefs opposing immunity—creating a deep divide between the responsible government bodies—also signals the need for this Court to resolve the dispute. Both the DOJ and the SEC have recognized (in cases in which they similarly disagreed) that the circumstances in which the antitrust laws are impliedly repealed by the securities laws "presents important questions involving the application of the antitrust laws to the multi-billion-dollar" securities markets and deserve this Court's attention. Jurisdictional Statement of the United States,

United States v. *NASD*, No. 73-1701, at 10 (May 1974); see Mem. of the SEC as Amicus Curiae in Support of Certiorari, *Gordon* v. *NYSE*, No. 74-304, at 6 (Nov. 1974). In both cases, review was granted and the SEC's views prevailed. Indeed, with the exception of the ruling below, courts have recognized immunity in every case in which the SEC has urged that immunity is necessary to accomplish the goals of the securities laws. See also *Austin Mun. Sec.* v. *NASD*, 757 F.2d 676 (5th Cir. 1985); *Thill Sec. Corp.* v. *NYSE*, 633 F.2d 65 (7th Cir. 1980).

The Second Circuit's ruling flies in the face of this Court's decisions in *NASD* and *Gordon*, which for 30 years have guided the immunity inquiry and which were recently reaffirmed in *Trinko*. The ruling below reduces the implied immunity doctrine to a dead letter—barely distinguishable from express immunity—by requiring an overt statement of legislative intent on the very conduct at issue, as well as a finding that the SEC has the power to compel, and has actually permitted, that conduct. This Court has imposed no such prerequisites for implied immunity.

By failing to make the implied immunity decision in light of the criteria laid down by this Court, the Second Circuit has undermined the SEC's regulatory mission and created great confusion regarding the recurring issue of when immunity applies. Indeed, this case is even more important as a practical matter than *NASD* and *Gordon* because the practices at issue—syndicated underwritings of IPO securities—are at the very heart of SEC regulation under the 1933 and 1934 Acts. The court of appeals' ruling threatens the public offering process, which was responsible for raising approximately $48 billion in 2004 alone, by forcing underwriters to focus on avoiding treble damages antitrust liability when forming and operating syndicates rather than on complying with the securities laws.

In sum, this Court should grant certiorari to prevent the securities regulatory scheme from being undermined by antitrust litigation in which the opinion of a lay jury applying narrow competition rules overrides the careful weighing of competitive concerns with broader goals of investor protection that Congress expressly committed to the SEC's expertise. See *Trinko*, 540 U.S. 398 (granting certiorari and reversing unanimous decision of Second Circuit that overturned dismissal on immunity grounds and permitted private antitrust litigation to undermine scheme of administrative regulation).

I. THE SECOND CIRCUIT IMPROPERLY REJECTED THE EXPERT VIEW OF THE SEC THAT IMMUNITY IS ESSENTIAL HERE TO MAKE THE SECURITIES LAWS WORK.

This Court emphasized in *Trinko* that where "a regulatory structure designed to deter and remedy anticompetitive harm" is in existence, "the additional benefit to competition provided by antitrust enforcement will tend to be small, and it will be less plausible that the antitrust laws contemplate such additional scrutiny." 540 U.S. at 412. There is no question that Congress has charged the SEC with weighing competition concerns in exercising its authority over the IPO allocation process. Under the Exchange Act, Congress expressly requires the SEC to balance competition against other interests "necessary or appropriate in furtherance of the purposes of" the Act. 15 U.S.C. § 78w(a)(2). Moreover, Congress reaffirmed this duty in 1996, when it amended both the Securities Act and the Exchange Act to require the SEC in carrying out its administrative functions to weigh competition among other factors. See 15 U.S.C. § 77b(b) (Securities Act) ("the [SEC] shall also consider, in addition to the protection of investors, whether the action will promote efficiency, competition, and capital formation"); 15 U.S.C. § 78c(f) (Exchange Act) (same); National Securities Markets Improvement Act of 1996, Pub. L. No. 104-290, § 106, 110

Stat. 3416, 3424-3425 (Oct. 11, 1996) (adding 15 U.S.C. §§ 77b(b) and 78c(f)).

The SEC informed the court of appeals that denying immunity in these cases would upset the regulatory scheme governing syndicated underwriting. Such a decision would "effectively supplant" the securities laws with antitrust litigation that, because it carries the risk of treble damages imposed by a lay jury, would "force participants in the securities markets to focus not on complying with the securities laws, but predominantly on avoiding antitrust liability." App., *infra*, 196a-197a. And it would make joint underwriter conduct during the IPO process subject to a statutory regime that "does not take into account the sensitive countervailing considerations that the securities laws, and the Commission's expert administration, are charged with weighing in the balance." *Id.* at 196a.

Congress well understood the need for the SEC to have broad and flexible authority to regulate complex and rapidly evolving securities markets. "[S]o delicate a mechanism as the modern stock exchange cannot be regulated efficiently under a rigid statutory program" but requires "considerable latitude" for "administrative discretion" in order "to avoid, on the one hand, unworkable 'strait-jacket' regulation and, on the other, loopholes which may be penetrated by slight variations in the method of doing business." S. REP. NO. 73-792, at 5 (1934); see also H.R. REP. NO. 73-1383, at 6-7 (1934) ("broad discretionary powers in the [SEC] have been found practically essential"). In order to preserve this flexibility, Congress squarely rejected the Justice Department's argument in connection with the 1975 amendments to the Exchange Act that the SEC "should be required * * * to adopt the least anticompetitive means of protecting investors and preserving fair and orderly markets in securities." Release No. 34-17371, 45 Fed. Reg. 83707, 83719 (Dec. 19, 1980); see *ibid.* ("Congress * * * declined to adopt that rigid stan-

dard and instead chose the balancing tests currently found in [15 U.S.C. § 78o-3(b)(9)] and elsewhere in the Act").

The need for broad discretionary powers is nowhere greater than in the area of "IPO allocation and commission practices," which "fall within the very heart of the Commission's regulatory authority." App., *infra*, 127a. As the Commission observed, its regulation of the syndicate offering process "has involved a continual adjustment of previous rules"—a dynamic regulatory response to "new issues as they emerge" that is incompatible with the application of the antitrust laws to the same conduct. *Id.* at 195a.

There is no doubt that the SEC, as it informed the courts below, has authority to regulate the joint conduct alleged in plaintiffs' antitrust complaints and has in fact subjected that conduct to "comprehensive and active Commission oversight and regulation." App., *infra*, 197a; see also *id.* at 127a. The Commission has pervasive authority over the underwriting process and compensation practices, actively oversees SRO rules concerning both, and has regulated and approved the joint syndicate underwriting system that plaintiffs challenge. It also has ample authority to protect investors and markets from manipulative conduct of any type. See *supra* pp. 6-9.

Tie-in conduct has not escaped Commission regulation. The SEC has power under section 9(a)(6) of the Exchange Act to prohibit (or allow) transactions intended to fix or stabilize securities prices, and under section 9(a)(2) to define prohibited trading intended to raise or depress prices. See 15 U.S.C. § 78w(a)(1) (granting the SEC power to make rules to implement the Act, including its antimanipulation provisions). For decades the Commission has vigilantly supervised public offering practices in "hot" markets in which demand for new issues is high, including "tie-in arrangements, and manipulation of the aftermarket." REPORT OF THE SEC CONCERNING THE HOT ISSUES MARKETS 28 (Aug. 1984); see *id.* at 37-40; REPORT OF THE SPECIAL STUDY OF SECURITIES

MARKETS OF THE SECURITIES AND EXCHANGE COMMISSION, H.R. Doc. No. 88-95, Part 1, at 487-488, 514-559 (Apr. 1963). During the purported class period here, it warned that Regulation M prohibits "activities that could artificially influence the market," including "'tie-in' agreements." SEC Div. of Market Regulation, Staff Legal Bulletin No. 10, *Prohibited Solicitations and "Tie-In" Agreements for Aftermarket Purchases* ¶¶ 1-2 (Aug. 25, 2000); see App., *infra*, 135a. It has since proposed amendments to Regulation M that would prohibit underwriters from receiving consideration from IPO customers above the offering price and has published for comment proposed SRO rule changes to address tie-ins. Release No. 34-50831, 69 Fed. Reg. 75774 (Dec. 17, 2004); Release No. 34-50896, 69 Fed. Reg. 77804 (Dec. 28, 2004).

The SEC has used its powers to investigate conduct of the sort challenged by plaintiffs, filing and settling actions against individual underwriters for alleged violations of Regulation M. *Supra* p. 7. The Exchange Act's antimanipulation provisions are also the basis for private securities fraud litigation directed at conduct alleged in these antitrust suits, in which legal rules prescribed by Congress in the securities laws and by the SEC will control. *Supra* pp. 4-5.

The SEC recognizes that sensitive, fact-specific evaluations must inform any assessment whether particular underwriting conduct violates the securities laws. Its *IPO Allocations Release* draws fine distinctions between permissible collaborative bookbuilding activity that includes inquiries about a would-be IPO allocant's aftermarket interest and the price at which it would purchase shares in the aftermarket, and unlawfully informing the customer that such purchases would improve its prospects of obtaining an allocation. See *supra* p. 8 & n.1. Similarly, the Commission distinguishes between permissibly allocating IPO shares to a good customer that pays substantial commissions and doing so as a quid pro quo for a customer paying "excessive com-

pensation" for services (itself a difficult determination). Release No. 34-50831, 69 Fed. Reg. at 75785. Accordingly, the SEC recognizes that the conduct alleged by plaintiffs "may or may not be permissible, depending upon the facts." App., *infra*, 156a. That line-drawing cannot be done by a lay jury applying generalized rule-of-reason principles under the antitrust laws, but depends on careful application of securities law principles, whether by the SEC, the SROs it regulates, or a court in private securities litigation.

In light of this regulatory history and ongoing regulatory activity, this Court's decisions in *Gordon* and *NASD* require immunity here. See App., *infra*, 140a-147a. Under this Court's precedents, implied immunity protects "'the operation of the regulatory scheme'" and is triggered when immunity is necessary "'to permit the [securities laws] to function as envisaged by the Congress.'" *Id.* at 143a, quoting *Gordon*, 422 U.S. at 688. Given the SEC's comprehensive authority over syndicate underwriting and manipulative conduct, its exercise of that authority over the conduct alleged here through both rulemaking and enforcement, and its statutory mandate to weigh competition concerns, the requirements for immunity set forth in *Gordon* and *NASD* are satisfied, as the SEC explained below. See App., *infra*, 193a-194a.

Because the SEC is well-placed to determine the impact of potential antitrust liability on the effective operation of its statutory powers and of the securities markets, federal courts in every previous case have credited those expert views. See 1A PHILLIP AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 240c, at 14 (2d ed. 2000). The Second Circuit's rejection of immunity where the SEC says it is essential to "the effectiveness of the regulatory regime established by Congress" and to prevent distortion of the capital formation process urgently calls for this Court's review. App., *infra*, 192a, 193a-194a.

II. THE SECOND CIRCUIT'S DECISION DIRECTLY CONFLICTS WITH RULINGS OF THIS COURT AND CREATES INTOLERABLE CONFUSION OVER THE SCOPE OF ANTITRUST IMMUNITY.

This Court has recognized implied immunity in circumstances closely analogous to those involved here. As the Court held in *Gordon*, "where the agency both has the power to control [defendant's] conduct and actually exercises that power," the antitrust laws are "ousted" because of the potential for conflict with the securities regulatory regime. 1A AREEDA & HOVENKAMP, *supra*, ¶ 243a, at 36 & n.6. In *NASD*, where the record was clear that Congress had vested in the SEC authority to regulate and supervise the challenged conduct and the SEC confirmed that its authority "w[ould] be compromised seriously" if the antitrust case were permitted to proceed, this Court concluded that implied repeal was necessary to make the regulatory scheme work. 422 U.S. at 729-730. Rather than follow the legal standards set forth in *Gordon* and *NASD*, the court of appeals invented a novel test that restricts the availability of implied immunity and diverges from the immunity standard used by any other circuit.

A. The Second Circuit's Decision Cannot Be Reconciled With This Court's Implied Immunity Rulings.

1. In *Silver*, this Court held that antitrust immunity for an NYSE order requiring members to eliminate telephone connections with nonmember firms was not "necessary to make the Securities Exchange Act work" because (at that time) the SEC lacked "jurisdiction to review particular instances of enforcement of exchange rules." 373 U.S. at 347, 357; see *id.* at 358 ("the Commission's lack of jurisdiction * * * means that the question of antitrust exemption does not involve any problem of conflict"). But, this Court observed, "a different case" would arise if the SEC had jurisdiction to review "exchange self-regulation" and safeguards were "built into the

regulatory scheme which perfor[m] the antitrust function of insuring that an exchange" would not apply its rules in an unjustifiably anticompetitive manner. *Id.* at 358-360.

2. That "different case" arose in *Gordon*, which like these cases involved antitrust challenges to alleged brokerage commission practices. Accepting the views of the SEC and rejecting those of the Department of Justice, this Court held that the defendants were immune from antitrust liability for allegedly conspiring to maintain fixed commission rates.

Gordon found "plain repugnancy" between the antitrust laws and securities regulatory regime. 422 U.S. at 682. Congress had given the SEC "direct regulatory power over rules and practices with respect to 'the fixing of reasonable rates of commission.'" *Id.* at 685. The SEC had exercised that power by "tak[ing] an active role in review of proposed rate changes," ultimately prohibiting fixed rates "not based on a simplistic notion in favor of competition, but rather on demonstrated deficiencies of the fixed commission rate structure." *Id.* at 676, 685. "[P]ermitting courts throughout the country to conduct their own antitrust proceedings would conflict with the regulatory scheme authorized by Congress." *Id.* at 690; see 1A AREEDA & HOVENKAMP, *supra*, ¶ 243d, at 43 (*Gordon* "focused on the importance of an antitrust immunity to the general regulatory scheme"). Without immunity, antitrust courts and the SEC would likely apply different standards to commission-setting practices because "the SEC must consider, in addition [to competition], the economic health of the investors, the exchanges, and the securities industry." *Gordon*, 422 U.S. at 689. This Court thus found immunity necessary in order to leave to the SEC the supervision of commission practices, as Congress intended. See *id.* at 691 (application of the antitrust laws to commission practices would "render nugatory the legislative provision for regulatory agency supervision").

3. In *NASD*, decided the same day, this Court held that antitrust immunity must be implied not only where the SEC actively exercises its regulatory authority over challenged conduct, but also where the SEC's authority is so pervasive that conflict with the antitrust laws is likely. At issue was whether the NASD and its members were entitled to antitrust immunity for allegedly conspiring to restrict the sale and fix prices of mutual-fund shares in the secondary market. 422 U.S. at 700. Because the Department of Justice (in an effort to avoid a finding of immunity) disclaimed a direct attack on NASD rules and instead challenged "various unofficial NASD interpretations" of those rules, this Court considered "whether the SEC's exercise of regulatory authority" under the securities laws was "sufficiently pervasive to confer an implied immunity." *Id.* at 730, 732. It held that the SEC's authority over the NASD and its members was "pervasive" and that the SEC "weigh[ed] competitive concerns" along with other interests in exercising that authority. *Id.* at 732-733. Because "the broad regulatory authority conferred upon the SEC * * * enable[d] it to monitor" the allegedly anticompetitive activities, "and the history of [SEC] regulations suggest[ed] no laxity in the exercise of this authority," defendants were entitled to antitrust immunity. *Id.* at 734. This Court thus refused to compromise the SEC's authority "to deal * * * flexibly with * * * detrimental trading practices" by subjecting them to the antitrust laws. *Id.* at 724-725.

Contrary to the view of the court of appeals *NASD* did not immunize only "association activities approved by the SEC" or turn on the "special status" of the NASD as an SRO. App. *infra*, 68a. An alleged conspiracy between broker-dealers who (like the underwriter defendants here) were members of the NASD was also held immune because of the SEC's pervasive regulatory authority. 422 U.S. at 733. Nor was immunity barred even though the SEC's "power to prescribe rules and regulations" governing certain conduct at issue was "unexercised." *Id.* at 721-722. Because the "main-

tenance of an antitrust action for activities so directly related to the SEC's responsibilities" could potentially subject defendants "to duplicative and inconsistent standards," the antitrust laws were "displaced by the pervasive regulatory scheme." *Id.* at 735.

4. This Court consistently has adhered to the principles set forth in *Gordon* and *NASD*, most recently in *Trinko*—a decision that the Second Circuit brushed aside. See App., *infra*, 41a n.36. *Trinko* involved an alleged unilateral refusal to deal by a regulated entity where dealing requirements were supervised by state and federal agencies. An explicit antitrust savings clause in the Telecommunications Act of 1996 precluded immunity. This Court nevertheless held an antitrust suit improper in light of the "real possibility" that an antitrust jury's judgment would "conflic[t] with the agency's regulatory scheme," which took competitive concerns into account. 540 U.S. at 406. The difficulty of analyzing the antitrust claim in *Trinko*—which, like plaintiffs' claims here raised the likelihood of "[m]istaken inferences," "false condemnations," and "interminable litigation"—also led this Court to conclude that while the costs of antitrust intervention would be great, "the additional benefit to competition provided by antitrust enforcement will tend to be small." *Id.* at 412, 414.

5. Instead of applying this Court's standards, the court below established a novel test for implied immunity that looks to whether the regulatory agency could compel the challenged action, whether the agency had permitted that action at some point, whether application of the antitrust laws would moot specific provisions of the securities laws, and whether Congress expressed an intent to immunize the specific conduct at issue. App., *infra*, 53a-55a.

The court of appeals' holding that immunity must be premised on the SEC's ability to "compel the anticompetitive conduct the antitrust laws would prohibit" (App., *infra*, 65a) finds no support in *NASD* or *Gordon*, which focus instead on

whether Congress "provided for SEC authority" to exercise "direct regulatory power," not on power to compel particular behavior. *Gordon*, 422 U.S. at 685, 690. The power to compel may be sufficient to imply immunity, but it is not a precondition for immunity. See 1A AREEDA & HOVENKAMP, *supra*, ¶ 243a, at 36-37.

The court of appeals also focused improperly on whether the SEC had permitted "tie-ins." See *id.* ¶ 243d, at 44 (agency authorization is not "a prerequisite to immunity"). Congress conferred on the SEC "direct regulatory power" to supervise syndicate underwriting and the sorts of conversations during that process that plaintiffs characterize as tie-ins. *Gordon*, 422 U.S. at 685. Because the SEC exercised that power, *Gordon* and *NASD* require immunity so as not to disrupt the regulatory scheme. Thus in *NASD*, this Court found implied immunity where the SEC had "pervasive regulatory power" over alleged conduct, even though that conduct was neither required nor affirmatively authorized by the Investment Company Act or SEC or NASD rules. See 422 U.S. at 730-733. Even a history of inattention is no barrier to immunity so long as the SEC possesses regulatory power. *Gordon*, 422 U.S. at 690. The court of appeals' inquiry overlooks the SEC's power to draw the line between proper and improper syndicate bookbuilding practices, which can be indiscriminately characterized as conspiracies to engage in "tie ins" by antitrust class action litigants demanding treble damages.

Under *Gordon* and *NASD*, the import of statutory purpose does not hinge, as the Second Circuit held, on whether Congress specifically "intended to immunize anti-competitive tie-in arrangements." App., *infra*, 64a. Nor does immunity require that there be a "provision, sentence, phrase, or word" of the statutory or regulatory scheme that will be mooted by application of the antitrust laws. App., *infra*, 65a. Rather, implied immunity turns on whether Congress authorized the SEC to review, evaluate, and regulate the practices at issue. Accordingly, *Gordon* concluded that the "Exchange Act was

intended by the Congress to leave the supervision of the fixing of reasonable rates of commission to the SEC." 422 U.S. at 691. Similarly, *NASD* concluded that Congress intended to authorize the SEC to deal "flexibly with * * * detrimental trading practices." 422 U.S. at 724-725.

The Second Circuit's novel ruling that implied immunity requires a narrowly focused indication that Congress meant to "immuniz[e] the specific anticompetitive activity" (App., *infra*, 64a) cannot be squared with *Gordon* or *NASD*. It would undermine the securities laws by immunizing, in a dynamic and rapidly evolving field, only that conduct specifically identified by Congress 70 years ago. Under that approach the distinction between express and implied immunities would virtually disappear. See 1A AREEDA & HOVENKAMP, *supra*, ¶¶ 242a, 242b, at 30-32 (express immunity applies when immunity "is express in the federal statute," is otherwise clear from the statute, or a "statute or rule * * * compels certain conduct"). Yet the very purpose of implied immunity is to enable a court to protect the workings of a regulatory scheme when Congress did not explicitly address immunity. It is unreasonable to require Congress to express a view as to unforeseeable future circumstances in order for immunity to be implied. Congress did not insert an antitrust savings clause in the securities laws, as it has in other statutes. This Court has made clear that immunity should be implied when necessary as a practical matter "to make the [securities laws] work." *Gordon*, 422 U.S. at 683.

The court of appeals' deviation from this Court's well-established implied immunity precedents—in a circuit in which the securities industry is based and most immunity claims have been litigated—threatens the entire scheme of federal securities regulation, as the SEC has explained. It deserves this Court's immediate attention.

B. The Second Circuit's Decision Creates Serious Confusion Concerning The Criteria For Implied Immunity.

The Second Circuit's test for implying immunity at the intersection of the securities and antitrust laws deviates from the law in other circuits and invites a flood of new antitrust class action litigation. Other courts of appeals facing this recurring issue have faithfully applied *Gordon* and *NASD*, consistently finding immunity to be required.

1. No court has ever before held that the SEC must be able to compel an action under the securities laws before that action may be impliedly immune. Courts have routinely implied immunity without first finding such a test satisfied. They have considered whether the SEC "exercises extensive oversight authority" over an activity. *Austin Mun. Sec., Inc.* v. *NASD*, 757 F.2d 676, 695 (5th Cir. 1985). They have evaluated whether the activity has been permitted by the SEC. *Harding* v. *American Stock Exch.*, 527 F.2d 1366, 1369-1370 (5th Cir. 1976); *Thill Sec. Corp.* v. *NYSE*, 633 F.2d 65, 70 (7th Cir. 1980). And they have analyzed whether the "SEC has jurisdiction over the challenged activity and deliberately has chosen not to regulate it." *Friedman* v. *Salomon/Smith Barney, Inc.*, 313 F.3d 796, 801 (2d Cir. 2002). Courts have never before required that the SEC possess the power to *compel* a particular activity before they imply antitrust immunity in the face of the SEC's authority to allow, prohibit, or otherwise regulate that activity.

2. Nor have other courts of appeals required a history of "SEC authorization—whether past or present—of the specific anticompetitive behavior." App., *infra*, 66a. They have instead granted immunity, as *Gordon* and *NASD* contemplated, upon finding that the SEC's authority to regulate creates risks of conflict with the antitrust regime. Thus, in *Austin Municipal*, the Fifth Circuit analyzed the SEC's authority to regulate the NASD disciplinary process, not its

track record in doing so. 757 F.2d at 695. The Seventh Circuit in *Schaefer* v. *First National Bank of Lincolnwood*, 509 F.2d 1287, 1300 (7th Cir. 1975), was similarly concerned with whether "[t]he sort of manipulation scheme underlying the plaintiffs' claim here was envisioned to be fully dealt with under the securities acts," not whether the SEC had actually regulated it.

3. The Second Circuit's requirement that a defendant identify a particular "provision, sentence, phrase, or word" of the securities laws that will be "mooted" or "significantly curtailed by applying the antitrust laws" (App., *infra*, 65a-66a) contrasts with the position of courts that consider instead whether the antitrust laws will interfere with a "legislative provision for regulatory agency supervision." *Gordon*, 422 U.S. at 691. Thus in *Thill*, the Seventh Circuit regarded it as critical that the SEC had broad authority over the commission rate system. 633 F.2d at 69-70. And in *Austin Municipal*, 757 F.2d at 694-695, the Fifth Circuit implied immunity because the SEC exercised "supervision and regulatory authority" over the NASD disciplinary process and application of antitrust laws could "unduly interfere with the SEC's jurisdiction."

None of these courts created a restrictive, multi-factor standard for implied antitrust immunity even remotely like the one fashioned by the Second Circuit here. In a system in which antitrust liability is determined by juries, damages are trebled, and plaintiffs can bring virtually any antitrust class action against securities defendants in the Second Circuit, these inconsistencies in the test applied and result reached are intolerable. The risk to underwriters and other market participants is such that they must conform their behavior not to "the Commission's expert administration" but to the most restrictive interpretation of the antitrust laws and immunity standards that could apply to that conduct. App., *infra*, 196a. The Second Circuit's ruling will for all practical purposes override the conflicting law of other circuits that comports

with *NASD* and *Gordon*, making the need for this Court's review more compelling.

III. THIS COURT'S INTERVENTION IS NECESSARY TO PREVENT SUBSTANTIAL ADVERSE CONSEQUENCES FOR U.S. SECURITIES MARKETS.

The risk of antitrust liability for conduct subject to SEC regulation "poses a substantial danger that [industry participants] would be subjected to duplicative and inconsistent standards." *NASD*, 422 U.S. at 735. If these antitrust suits are permitted to go forward, collaborative conduct during a syndicated public offering that is authorized, or not proscribed, by the SEC could nonetheless be deemed unreasonable by an antitrust jury and punished with treble damages payable to a sprawling class of investors.

Underwriters would lack reliable guidance in such an environment. With every syndication involving concerted conduct and every discussion with buyers open to depiction as collusion, underwriters would be fearful that building a book and assessing market interest—activities expressly authorized by the SEC (see *supra* pp. 3-4, 6)—would expose them to treble-damages liability in massive class actions. The same problem of conflicting standards arises even for activities that are currently barred by the SEC. The Commission explained that careful line drawing is essential to separate permissible from impermissible actions and that it may, in the future, deem currently proscribed activities to be permissible elements of the IPO process. App., *infra*, 191a; see *supra* pp. 7-9. As the SEC told the court of appeals, without a holding of immunity in this case, "antitrust concerns will become the predominant considerations in the underwriting process." App., *infra*, 194a.[2]

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[2] The court of appeals believed that the potential for application on remand of a "rule of reason" analysis "lowers the stakes" of the implied immunity decision. App., *infra*, 60a. But rule of reason

This shift in securities regulation would profoundly disrupt capital formation in the United States, which is principally achieved through syndicate underwritings of the kind challenged here. As the SEC explained, "the fear of potentially crippling treble damages awards could over-deter conduct that would serve the interests of the markets and the capital formation process." App., *infra*, 194a. The capital-raising process would become captive to the competition-first principles of the Sherman Act, applied by lay juries, undermining the "uniformity and certainty" that Congress has deemed essential "if our markets are to remain ahead of those in London, Frankfurt, Tokyo or Hong Kong." 143 Cong. Rec. 21357 (1997) (Statement of Sen. Dodd).

As we have described in Part I, *supra*, permitting respondents' allegations to be adjudicated under the antitrust laws would undercut the SEC's practical authority to regulate in this area, contrary to the will of Congress. As one leading commentator has observed, "parallel track antitrust proceedings are highly likely to frustrate the agency's own role in applying its expertise to business conduct within its jurisdiction." Herbert Hovenkamp, *Antitrust Violations in Securities Markets*, 28 J. CORP. L. 607, 632-633 (2003).

Permitting antitrust law to displace securities regulation in this fashion also would heavily burden the federal courts. The plaintiffs' bar, even more eagerly than with securities

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analysis requires a complex and largely unpredictable evaluation of the procompetitive benefits and asserted justifications for the challenged conduct. Even if a rule of reason analysis were undertaken by a jury and sufficiently took into account administrative concerns (which given the line drawing necessary in this area is improbable), it would leave participants in syndicate underwritings exposed to grave uncertainties in class action antitrust litigation. Immunity is particularly appropriate when antitrust claims are complex and difficult to evaluate, which is certainly true of a rule of reason analysis in this area. See *Trinko*, 540 U.S. at 414.

complaints, can be expected to file antitrust claims at every opportunity, lured by treble damages and awards of attorneys' fees (neither of which are available under the securities laws). See KENNETH ELZINGA & WILLIAM BREIT, THE ANTITRUST PENALTIES 90-94 (1976) (treble damages remedy encourages filing of strike suits). These cases would consume enormous judicial resources because antitrust suits, widely "known as 'serpentine labyrinths' in which discovery is a 'bottomless pit,'" tend to be far more complex and costly than other civil actions. 6 MOORE'S FEDERAL PRACTICE § 26.46[1], at 26-146.24 (3d ed. 2005). If the securities laws themselves do not create a scheme of "broad insurance against market losses" (*Dura Pharms., Inc.* v. *Broudo*, 125 S. Ct. 1627, 1633 (2005)), Congress surely did not envisage treble damages for participants in stock market bubbles who wish to bypass federal securities remedies.

Congress has addressed the risk of strike suit class actions in the securities context by barring punitive damages, heightening pleading requirements, and regulating class litigation. *E.g.*, 15 U.S.C. § 78bb (barring punitive damages in securities fraud actions); Private Securities Litigation Reform Act, *id.*, § 78u-4(b)(1), (2) (requiring particularized pleading in securities fraud complaints); *id.*, § 78u-4(a) (establishing special procedural requirements for securities class actions). This Court too, has imposed pragmatic limitations on private securities fraud suits because they present "a danger of vexatiousness different in degree and in kind from that which accompanies litigation in general." *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723, 739-740 (1975). *E.g.*, *Dura*, 125 S. Ct. at 1631-1634 (requiring proof of loss causation); *Ernst & Ernst* v. *Hochfelder*, 425 U.S. 185 (1976) (requiring proof of scienter, not mere negligence); *TSC Indus.* v. *Northway, Inc.*, 426 U.S. 438 (1976) (rejecting lax definition of materiality); *Santa Fe Indus.* v. *Green*, 430 U.S. 462 (1977) (limiting definition of actionable manipulation); *Central Bank* v. *First Interstate Bank*, 511 U.S. 164, 189 (1994) (barring aid-

ing and abetting claims). Litigants should not be allowed to evade these limitations, and circumvent the will of Congress, by bringing a claim directed at the underwriting process under the antitrust laws rather than the securities laws.

This Court consistently has sought to protect the integrity of the regulatory process and avoid the conflict and confusion that result from parallel antitrust and regulatory challenges to the same conduct, determining if immunity is appropriate by gauging the practical consequences of antitrust adjudication on effective administrative supervision. An important factor in that analysis is that expert agencies often "are better equipped than courts by specialization, by insight gained through experience, and by more flexible procedure" to resolve industry-specific disputes. *Far East Conf.* v. *United States*, 342 U.S. 570, 574-575 (1952).

Careful distinctions drawn by the SEC between proper and improper IPO conduct will disintegrate if lay juries may instead apply a "reasonableness" standard under general antitrust criteria to respondents' claims. "[A]gency oversight ensures consistency of outcomes, something that antitrust jury trials would never produce." Hovenkamp, *supra*, 28 J. CORP. L. at 630. The blunt sanction of treble damages should not be superimposed upon regulatory disputes that are better addressed under the more carefully calibrated regulatory scheme established by Congress. *Trinko*, 540 U.S. at 406.

In sum, the court of appeals' rejection of implied immunity, unless reversed, will impose conflicting standards on underwriters, chill capital formation, undermine the delegated authority of the SEC, burden the federal courts, and produce unjust outcomes through blackmail settlements. Review by this Court is required to prevent these serious harms.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

ROBERT B. MCCAW
LOUIS R. COHEN
ALI M. STOEPPELWERTH
FRASER L. HUNTER, JR.
NOAH A. LEVINE
WILMER CUTLER PICKERING
HALE & DORR LLP
399 Park Avenue
New York, New York 10022
(212) 230-8800
Attorneys for Petitioner
Citigroup Global Markets
Inc.

ANDREW J. FRACKMAN
RICHARD G. PARKER
BRENDAN DOWD
O'MELVENY & MYERS LLP
Seven Times Square
New York, New York 10036
(212) 326-2000
Attorneys for Petitioner
Robertson Stephens, Inc.

A. ROBERT PIETRZAK
JOEL M. MITNICK
SIDLEY AUSTIN LLP
787 Seventh Avenue
New York, New York 10019
(212) 839-5300
Attorneys for Petitioner
Deutsche Bank Securities Inc.

RICHARD A. CIRILLO
KAREN R. KOWALSKI
KING & SPALDING LLP
1185 Avenue of the Americas
New York, New York 10036
(212) 556-2100
Attorneys for Petitioner
Credit Suisse First Boston LLC

STEPHEN M. SHAPIRO
Counsel of Record
KENNETH S. GELLER
TIMOTHY S. BISHOP
MAYER, BROWN, ROWE &
MAW LLP
1909 K Street, N.W.
Washington, D.C. 20006
(202) 263-3000
Attorneys for Petitioner
Merrill Lynch, Pierce,
Fenner & Smith Incorpo-
rated

ANDREW B. CLUBOK
RICHARD A. CORDRAY
BRANT W. BISHOP
STEVEN A. ENGEL
KIRKLAND & ELLIS LLP
655 15th Street, N.W.
Washington, D.C. 20005
(202) 879-5000
Attorneys for Petitioner
Morgan Stanley & Co. Inc.

SHEPARD GOLDFEIN
JAMES A. KEYTE
SKADDEN, ARPS, SLATE,
MEAGHER & FLOM LLP
Four Times Square
New York, New York 10036
(212) 735-3000
Attorneys for Petitioners
Janus Capital Management
LLC

MOSES SILVERMAN
PHILIP G. BARBER
PAUL, WEISS, RIFKIND,
WHARTON & GARRISON LLP
1285 Avenue of the Americas
New York, New York 10019
(212) 373-3000
Attorneys for Petitioner
Lehman Brothers Inc.

JON R. ROELLKE
JEFFREY H. DRICHTA
CLIFFORD CHANCE US LLP
2001 K Street, N.W.
Washington, D.C. 20006-1001
(202) 912-5000
Attorneys for Petitioner
Merrill Lynch, Pierce,
Fenner & Smith Incorporated

PAUL GONSON
GLENN R. REICHARDT
KIRKPATRICK & LOCKHART
NICHOLSON GRAHAM LLP
1601 K Street, N.W.
Washington, D.C. 20006
(202) 778-9000
Attorneys for Petitioner
Merrill Lynch, Pierce,
Fenner & Smith Incorporated

GANDOLFO V. DIBLASI
PENNY SHANE
DAVID M.J. REIN
RICHARD J.L. LOMUSCIO
SULLIVAN & CROMWELL LLP
125 Broad Street
New York, New York 10004
(212) 558-4000
Attorneys for Petitioners
The Goldman Sachs Group,
Inc. and Goldman, Sachs &
Co.

RANDY M. MASTRO
JOHN A. HERFORT
RICHARD FALEK
GIBSON, DUNN & CRUTCHER
LLP
200 Park Avenue
New York, New York 10166
(212) 351-4000
Attorneys for Petitioner
Bear, Stearns & Co., Inc.

STEVEN WOLOWITZ
MATTHEW INGBER
MAYER, BROWN, ROWE &
MAW LLP
1675 Broadway
New York, New York 10019
(212) 506-2500
Attorneys for Petitioner
Comerica, Inc.

GERALD J. FIELDS
KEVIN C. LOGUE
PAUL HASTINGS JANOFSKY
& WALKER LLP
75 East 55th Street
New York, New York 10022
(212) 318-6000
Attorneys for Petitioners Van Wagoner Capital Management, Inc. and Van Wagoner Funds, Inc.

DAVID W. ICHEL
JAYMA M. MEYER
SIMPSON THACHER &
BARTLETT LLP
425 Lexington Avenue
New York, New York 10017
(212) 455-2000
Attorneys for Petitioner J.P. Morgan Securities Inc.

JOHN D. DONOVAN
ROBERT G. JONES
ROPES & GRAY LLP
One International Place
Boston, Massachusetts 02110
(617) 951-7000
Attorneys for Petitioners Fidelity Distributors Corp., Fidelity Brokerage Services LLC, and Fidelity Investments Institutional Services Co., Inc.

MARCH 2006

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Glen Billing, individually and on behalf of all those similarly situated, et al.,

Plaintiffs-Appellants,

Bajrang Agarwal, et al.,

Plaintiffs,

-v.-

Credit Suisse First Boston Ltd., Goldman, Sachs & Co., Lehman Brothers Inc., Merrill Lynch, Pierce, Fenner & Smith, Inc., Morgan Stanley Dean Witter, BancBoston Robertson, Stephens, Inc., Citigroup Global Markets, Inc., J.P. Morgan & Co., Merrill Lynch & Co., Inc., Fidelity Distributors Corporation, Fidelity Brokerage Services, Inc., Fidelity Investments Institutional Services Co., Janus Capital Corporation, Comerica, Inc., Van Wagoner Capital, Van Wagoner Funds, Inc., and J.P. Morgan Securities, Inc.,

Defendants-Appellees.

Docket Nos. 03-9284L & 03-9288CON

December 13, 2004, Argued
September 28, 2005, Decided

As Amended, October 26, 2005.

Before: OAKES, KATZMANN, and WESLEY, Circuit Judges.

WESLEY, *Circuit Judge*:

Plaintiffs allege an epic Wall Street conspiracy. They charge that the nation's leading underwriting firms entered into illegal contracts with purchasers of securities distributed in initial public offerings ("IPOs"). Through these contracts

and by other illegal means, the underwriting firms allegedly executed a series of manipulations that grossly inflated the price of the securities after the IPOs in the so-called aftermarket. Plaintiffs contend that the firms capitalized on this artificial inflation, profiting at the expense of the investing public.

Plaintiffs tell a compelling story and are not the first to tell it. Similar allegations have appeared in a separate class action, *see In re Initial Pub. Offering Sec. Litig.*, 241 F. Supp. 2d 281, 293-94 (S.D.N.Y. 2003), in a report of the New York Stock Exchange ("NYSE") and the National Association of Securities Dealers ("NASD"), *see* NYSE/NASD IPO ADVISORY COMMITTEE, NYSE/NASD, REPORT AND RECOMMENDATIONS 1-2 (May 2003) ("IPO ADVISORY COMMITTEE REPORT"), *available at* http://www.nasd.com/web/groups/rules_regs/documents/rules_regs/nasdw_010373.pdf, and in complaints filed by the Securities and Exchange Commission (the "SEC" or "Commission").[1] What most immediately distinguishes the present charges from prior ones is that the earlier allegations were made in the context of the laws governing securities—laws and regulations arising primarily from the Securities Act of 1933, Pub. L. No. 73-22, 48 Stat.

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[1] *See, e.g.*, *SEC v. Goldman Sachs & Co.*, SEC Litig. Release No. 19,051 (Jan. 25, 2005); *SEC v. Morgan Stanley & Co.*, Litig. Release No. 19,050 (Jan. 25, 2005); *SEC v. J.P. Morgan Sec., Inc.*, SEC Litig. Release No. 18,385 (Oct. 1, 2003); *SEC v. Robertson Stephens, Inc.*, SEC Litig. Release No. 17,923 (Jan. 9, 2003); *SEC v. Credit Suisse First Boston Corp.*, SEC Litig. Release No. 17,327 (Jan. 22, 2002). *See generally* Commission Guidance Regarding Prohibited Conduct in Connection with IPO Allocations; Final Rule, Securities Act Release No. 8565, Exchange Act Release No. 51,500 (Apr. 7, 2005), 70 Fed. Reg. 19,672, 19,672-73 (Apr. 13, 2005) (highlighting recent abuses).

74 ("the Securities Act" or "the 1933 Act"), and the Securities Exchange Act of 1934, Pub. L. No. 73-290, 48 Stat. 881 ("the Securities Exchange Act," "the Exchange Act," or "the 1934 Act"). By contrast, the present actions arise under the antitrust laws—specifically, section 1 of the Sherman Act, ch. 647, 26 Stat. 209 (1890) (codified as amended at 15 U.S.C. § 1), section 2(c) of the Robinson-Patman Act, Pub. L. No. 74-692, 49 Stat. 1526, 1527 (1936) (codified as amended at 15 U.S.C. § 13(c)), and various state antitrust provisions.[2]

The question on appeal is whether these antitrust claims can stand. Defendants argue that, assuming plaintiffs' allegations are true, only securities laws can provide a

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[2] The *In re Initial Public Offering Antitrust Litigation* plaintiffs allege violations of section 44-1401 *et seq.* of the Arizona Revised Statutes, section 17200 *et seq.* of the California Business and Professional Code, section 28-4503 *et seq.* of the District of Columbia Annotated Statutes, section 501.201 *et seq.* of the Florida Statutes, section 50-101 *et seq.* of the Kansas Statutes Annotated, section 51:137 *et seq.* of the Louisiana Revised Statutes, section 1101 *et seq.* of title 10 of the Maine Revised Statutes Annotated, chapter 93A of the Massachusetts Annotated Laws, section 445.773 *et seq.* of the Michigan Compilation of Laws Annotated, section 325D. 52 *et seq.* of the Minnesota Statutes, section 75-21-1 *et seq.* of the Mississippi Code Annotated, section 598A *et seq.* of the Nevada Revised Statutes Annotated, section 56:9-1 *et seq.* of the New Jersey Antitrust Act, section 57-1-1 *et seq.* of the New Mexico Statutes Annotated, section 75-1 *et seq.* of the North Carolina General Statutes, section 51-08.1-01 *et seq.* of the North Dakota Century Code, section 37-1 *et seq.* of the South Dakota Codified Laws Annotated, section 47-25-101 *et seq.* of the Tennessee Code Annotated, section 2453 *et seq.* of title 9 of the Vermont Statutes Annotated, section 47-18-1 *et seq.* of the West Virginia Code, and section 133.01 *et seq.* of the Wisconsin Statutes.

remedy. The district court agreed. *See In re Initial Pub. Offering Antitrust Litig.*, 287 F. Supp. 2d 497, 499, 523-25 (S.D.N.Y. 2003) ("*IPO Antitrust Litig.*"). It held that, regarding the alleged conduct, the securities laws impliedly repealed federal antitrust laws and preempted state antitrust laws. *See id.* It therefore dismissed the complaints. *Id.* at 525.

The district court's decision goes too far. The heart of the alleged anticompetitive behavior finds no shelter in the securities laws. Accordingly, we vacate and remand for further proceedings.

I

Essential to this appeal is a basic understanding of the securities underwriting process and certain manipulations of the process, most particularly the practice of tying excess consideration to an IPO securities allocation.

A

An underwriting firm provides underwriting services to issuers of securities. The most common delivery of those services is by firm-commitment agreements. 1 THOMAS LEE HAZEN, THE LAW OF SECURITIES REGULATION § 2.1[2][B], at 156 (5th ed. 2005). The appeal of this type of agreement is certainty for the issuer: "The underwriting investment banker agrees that on a fixed date the corporation will receive a fixed sum for a fixed amount of its securities." Statement of the Commission on the Problem of Regulating the "Pegging, Fixing and Stabilizing" of Security Prices Under Sections 9(a)(2), 9(a)(6), and 15(c)(1) of the Securities Exchange Act, Exchange Act Release No. 2446 (March 18, 1940), 11 Fed. Reg. 10,971, 10,972 (Sept. 27, 1946) ("1940 Statement"). The underwriting agreement thus removes "factors of uncertainty" for the issuer, *see id.*, and transfers to the underwriter the risk of any inability to sell an issue, *see* GOING PUBLIC AND LISTING ON THE U.S. SECURITIES MARKETS, NASD 167.

Syndicates emerged in the first half of the twentieth century as an essential means by which underwriters could manage the risks inherent in underwriting. *See generally United States v. Morgan*, 118 F. Supp. 621, 635-55 (S.D.N.Y. 1953). At that time, "no single underwriter could have borne alone the underwriting risk involved in the purchase and sale of a large security issue," and "no single underwriter could have effected a successful public distribution of the issue."[3] *Id.* at 640. The syndicate was a group typically "consisting of from a few to well over one hundred underwritten houses, [that bought] the entire new issue of securities from the issuing corporation at a predetermined fixed price"—the "purchase" price—"and immediately reoffered it to the public at a slightly higher price which is also a predetermined fixed price (the 'offering' or 'issue' price)." 1940 Statement, 11 Fed. Reg. at 10,972. "The issue was typically resold to the public both by the underwriters and by a so-called 'selling group' . . . who acted as retailers for the underwriting syndicate." *Id.* The syndicate system remains a prominent feature of the modern

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[3] Thus in 1906, when Goldman, Sachs & Co. desired to enter the underwriting business and was unable to raise enough capital to do so, Henry Goldman convinced Philip Lehman to share the risk, and together Goldman, Sachs & Co. and Lehman Brothers obtained sufficient capital to finance United Cigar Manufacturers (later named the General Cigar Co.). *See Morgan*, 118 F. Supp. at 637. This partnership, which involved jointly purchasing security issues directly from issuers and equally dividing what profits they realized from the sale, allowed the two firms to finance other enterprises like Sears, Roebuck & Co. and B.F. Goodrich Co. *See id.* at 637-38.

underwriting industry. *See IPO Antitrust Litig.*, 287 F. Supp. at 507.[4]

A lead underwriter in a syndicate must assess the appropriate issue quantity and pricing for the IPO. *See* Commission Guidance Regarding Prohibited Conduct in Connection with IPO Allocations; Final Rule, Securities Act Release No. 8565, Exchange Act Release No. 51,500 (Apr. 7, 2005), 70 Fed. Reg. 19,672, 19,674 & n.30 (Apr. 13, 2005) ("2005 Guidance Statement"). This is a difficult task, *see* 2 HAZEN, *supra* § 6.3[1], at 23-24, in which the lead underwriter is aided in part by "book-building":

> When used, the IPO book-building process begins with the filing of a registration statement with an initial estimated price range. Underwriters and the issuer then conduct "road shows" to market the offering to potential

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[4] Typically, the principal underwriters will sign the firm-commitment underwriting agreement. These managers or principal underwriters in turn contact other broker-dealers to become members of the underwriting group who are to act as wholesalers of the securities to be offered. In many instances the securities distribution network will include the use of a selling group of other investment bankers or brokerage houses. Members of the selling group generally do not share the underwriters' risk and are thus retailers who are compensated with agents' or brokers' commission rather than by sharing in the underwriting fee.

1 HAZEN, *supra* § 2.1[2][B], at 156; *cf.* Review of Antimanipulation Regulation of Securities Offerings, Securities Act Release No. 7057, Securities Exchange Act Release No. 33,924 (Apr. 25, 1994), 59 Fed. Reg. 21,681, 21,686 (Apr. 26, 1994) ("A firm commitment underwriting typically involves a group of underwriters, represented by one or more managing underwriters, an underwriting group, and a number of 'selling group' members.").

> investors, generally institutions. The road shows provide investors, the issuer, and underwriters the opportunity to gather important information from each other. Investors seek information about a company, its managements and its prospects, and underwriters seek information from investors that will assist them in determining particular investors' interest in the company, assessing demand for the offering, and improving pricing accuracy for the offering. Investors' demand for an offering necessarily depends on the value they place, and the value they expect the market to place, on the stock, both initially and in the future. In conjunction with the road shows, there are discussions between the underwriter's sales representatives and prospective investors to obtain investors' views about the issuer and the offered securities, and to obtain indications of the investors' interest in purchasing quantities of the underwritten securities in the offering at particular prices. . . By aggregating information obtained during this period from investors with other information, the underwriters and the issuer will agree on the size and pricing of the offering, and the underwriters will decide how to allocate the IPO shares to purchasers.

2005 Guidance Statement, 70 Fed. Reg. at 19,674-75 (footnote omitted). Underwriters thus use this process to collect indications of interest regarding the IPO, as well as potential investors' views on the value of the proposed security. *See id.* at 19,675.

B

The SEC has noted that the book-building process can become a locus of IPO and IPO-aftermarket manipulation by

syndicate members.[5] *See* 2005 Guidance Statement, 70 Fed. Reg. at 19,675. Underwriters have strong incentives to manipulate the IPO process to facilitate the complete distribution and sale of an issue. Underwriting is a business; competitive forces dictate that underwriters associated with successful IPOs will attract future issuers. Moreover, because underwriters assume a large measure of risk in the event an IPO fails, they have a direct interest in the IPO's success. *See* Amendments to Regulation M: Anti-Manipulation Rules Concerning Securities Offerings, Securities Act Release No. 8511, Exchange Act Release No. 50,831 (Dec. 9, 2004), 69 Fed. Reg. 75,774, 75,783-84 (Dec. 17, 2004) ("2004 Proposed Amendments").

Underwriters also have incentives to manipulate the price of securities in the aftermarket. Again, competition is one force at play: "Underwriters have an incentive to artificially influence aftermarket activity because they have underwritten the risk of the offering, and a poor aftermarket performance could result in reputational and subsequent financial loss."[6]

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[5] The aftermarket is the period of trading commencing after the conclusion of the period of distribution of a security. *See* 2005 Guidance Statement, 70 Fed. Reg. at 19,672 n.1. Generally speaking, the aftermarket period follows the termination of formal syndicate activity, also termed the "breaking of the syndicate." Trading Practices Rules Concerning Securities Offerings, Proposed Rules, Securities Act Release No. 7282, Exchange Act Release No. 37,094 (Apr. 11, 1996), 61 Fed. Reg. 17,108, 17,124 (Apr. 18, 1996).

[6] *See Friedman v. Salomon/Smith Barney, Inc.*, 313 F.3d 796, 798 (2d Cir. 2002) (reciting allegation that underwriters have an incentive to manipulate the aftermarket because they "attract future business based on the stock price performance of current public offerings"); *see also* Trading Practices Rules Concerning Securities Offerings, 61 Fed. Reg. at 17,124 ("Aftermarket participation may be an expected part of the underwriting services

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Staff Legal Bulletin No. 10: Prohibited Solicitation and "Tie-in" Agreements for Aftermarket Purchases, Division of Market Regulation (Aug. 25, 2000), *available at* http://www.sec.gov/interps/legal/ slbmr10.htm ("Staff Legal Bulletin No. 10"). Another incentive arises from underwriters' control over the allocation of securities. Persons or entities receiving allocations can make quick profits from an artificial rise in the immediate aftermarket during a "hot issue,"[7] and underwriters might "desire to allocate at least some shares to their best customers in order to maintain client relationships." IPO ADVISORY COMMITTEE REPORT 10.

Not all underwriter manipulations are prohibited: the securities regime tolerates "a little price manipulation" in order to further other goals. *Strobl v. New York Mercantile Exch.*, 768 F.2d 22, 28 (2d. Cir. 1985). The SEC has traditionally recognized certain types of manipulations, deemed "stabilizing" activities, as legitimate and permissible under section 9(a)(6) of the Exchange Act, 48 Stat. at 890 (codified at 15 U.S.C. § 78i(a)(6)), and SEC Rule 10b-1, 17 C.F.R. § 240.10b-1. Section 9(a)(6) makes it unlawful

> to effect either alone or with one or more other persons any series of transactions for the purchase and/or sale of any security registered on a national securities exchange

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provided to an issuer, and the anticipated quality of such services can influence the issuer's selection of a managing underwriter.").

[7] "Hot issues" are securities "that generate a good deal of buying interest." 2 HAZEN, *supra* § 6.0, at 1-2. "In 'hot' IPOs, investor demand significantly exceeds the supply of securities in the offering and the stock trades at a premium in the immediate aftermarket." 2005 Guidance Statement, 70 Fed. Reg. at 19,672 n.5.

> for the purpose of pegging, fixing, or stabilizing the price of such security in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

48 Stat. at 890 (codified at 15 U.S.C. § 78i(a)(6)). In 1948, the SEC incorporated the prohibitions arising under section 9 and the rules and regulations thereunder into the definition of "manipulation" of section 10(b) of the Exchange Act, 48 Stat. at 891 (codified as amended at 15 U.S.C. § 78j(b)), thereby extending section 9's "stabilization" rules to securities not traded on exchanges. *See Manipulative and Deceptive Devices and Contrivances*, 13 Fed. Reg. 8183 (Dec. 22, 1948); 17 C.F.R. § 240.10b-1. Stabilization in the context of exchange trading and non-exchange trading has been continuously regulated and, to some extent, recognized as legitimate and permissible.[8]

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[8] *See, e.g.*, 1940 Statement, 11 Fed. Reg. at 10,974 ("Stabilization, it must be recognized, is now an integral part of the American system of fixed price security distribution."); Reports on Stabilizing Activities, 21 Fed. Reg. 501 (Jan. 21, 1956); Reports on Stabilizing Activities, 21 Fed. Reg. 2787 (Apr. 28, 1956); Manipulative and Deceptive Devices and Contrivances, Notice of Proposed Rule Making, 21 Fed. Reg. 9983 (Dec. 14, 1956); Reports on Stabilizing Activities, Notice of Proposed Rule Making, Exchange Act Release No. 9605, 37 Fed. Reg. 10,960 (June 1, 1972); Presentation of Records, Reports, and Forms for Reports on Stabilizing Activities, Exchange Act Release No. 9717 (Aug. 15, 1972), 37 Fed. Reg. 17,383 (Aug. 26, 1972); Amendments Relating to Reports of Stabilizing Transactions, Exchange Act Release No. 18,983 (Aug. 19, 1982), 47 Fed. Reg. 37,560 (Aug. 26, 1982); *Trading Practices Rules Concerning Securities Offerings*, 61 Fed. Reg. at 17,123-25.

Significantly, from its earliest statements on stabilization, the SEC has recognized that permissible forms of stabilization are limited to those attempts to maintain price levels of a security or to retard a decline in a security's price. In 1954, for instance, the Commission proposed new stabilization regulations that it viewed as "a formulation of principles which historically have been applied in considering questions relating to manipulative activity and stabilization in connection with a distribution." Manipulative and Deceptive Devices and Contrivances, 19 Fed. Reg. 2986, 2986 (May 22, 1954) ("1954 Proposed Rules"). These regulations limited permissible stabilizing bids to those with "the purpose of preventing or retarding a decline in the open market price of [a] security." *Id.*; *see Manipulative and Deceptive Devices and Contrivances*, 20 Fed. Reg. 5075 (July 15, 1955) (adopting the 1954 Proposed Rules as 17 C.F.R. § § 240.10b-6, 240.10b-7, and 240.10b-8). Likewise, in 1959, while issuing proposed amendments, the Commission commented, "The term 'stabilizing' has generally been accepted to mean the placing of any bid or the effecting of any purchase . . . for the purpose of preventing or retarding a decline in the open market price of a security." Manipulative and Deceptive Devices and Contrivances, Notice of Proposed Rule Making, 24 Fed. Reg. 9946, 9947 (Dec. 9, 1959) ("1959 Proposed Rules"). And, alongside a 1991 proposed rule, the Commission cautioned that "stabilization does not contemplate transactions in excess of those required to prevent or retard a decline in the market price, or those which raise the market price of a security . . . ." Stabilizing to Facilitate a Distribution, Securities Act Release No. 6880, Exchange Act Release No. 28,732 (Jan. 3, 1991), 56 Fed. Reg. 815 (Jan. 9, 1991) ("1991 Proposed Rules").

Permissible stabilization activities are often contrasted with activities raising prices, which are prohibited under section 9(a)(2) of the Exchange Act, 48 Stat. at 889 (codified as amended at 15 U.S.C. § 78i(a)(2)). For instance, in 1994,

the SEC engaged in a comprehensive review of its rules governing manipulation in securities offerings. *See* Review of Antimanipulation Regulation of Securities Offerings, Securities Act Release No. 7057, Securities Exchange Act Release No. 33,924 (Apr. 25, 1994), 59 Fed. Reg. 21,681, 21,681 (Apr. 26, 1994) ("1994 Review"). One section of the review dealt with stabilization and expressed the Commission's "concept" that "stabilization of offerings should be restricted in order to minimize its manipulative impact." *Id.* at 21,689. The 1994 Review explained that underwriters engage in various activities in the aftermarket—although the particular activities are not defined—and that some of those activities "may support, or even raise, the market price of the security." *Id.* The 1994 Review also recounted in its appendix that "Congress enacted the Exchange Act to put an end to the practices that it found had contributed to the economic problems facing the Nation." *Id.* at 21,694. "One of the 'chief evils,'" prohibited by section 9(a)(2), "was the operation of 'pools,' which were agreements among several persons to trade actively in a security, generally to raise the price of a security by concerted activity, in order to sell their holdings at a profit to the public, which is attracted by the activity or by information disseminated about the stock."[9] *Id.* at 21,694 n.3. The Commission expressly distinguished between section 9(a)(2), which covered absolutely prohibited manipulations, and section 9(a)(6), which covered manipulations that the SEC could choose to permit. *Id.* at 21,694-95 & nn.3, 14. The Commission noted that the prohibitions in section 9(a)(2) represented the "heart" of the Act. *Id.* at 21,694. The SEC currently regulates stabilization practices with SEC Rule 104,

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[9] The 1940 Statement explained that section 9(a)(2) prohibited certain "pool manipulations." 1940 Statement, 11 Fed. Reg. at 10,975-76.

which is part of Regulation M. *See* 17 C.F.R. § 242.104. That rule, consistent with historic SEC regulations, prohibits stabilization "except for the purpose of preventing or retarding a decline in the market price of a security." *Id.* § 242.104(b).

Among the impermissible manipulative practices regulated by the SEC is a general category of relationships between underwriters and prospective purchasers termed "tie-ins." "A 'tie-in agreement' in the securities offering context generally refers to requiring either implicitly or explicitly that customers give consideration in addition to the stated offering price of any security in order to obtain an allocation of the offered shares." 2004 Proposed Amendments, 69 Fed. Reg. at 75,783 n.95. Thus, the broadest category of tie-in arrangements includes all agreements requiring consideration from purchasers above the offering price. These have been termed *quid pro quo* arrangements. *See, e.g.*, Self-Regulatory Organizations, Notice of Filing of Proposed Rule Changes, Exchange Act Release No. 50,896 (Dec. 20, 2004), 69 Fed. Reg. 77,804, 77,805-06, 77,807, 77,810 (Dec. 28, 2004) ("2004 SRO Notice"). The *quid pro quo* consideration could, for instance, require customers to participate in another offering, including an offering in which supply exceeds demand, a "cold" offering.[10] *See* 2004 Proposed Amendments, 69 Fed. Reg. at

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[10] In 1974, the SEC proposed a rule that would expressly prohibit these aftermarket tie-in arrangements. *See* Certain Short Selling Of Securities and Securities Offerings, Exchange Act Release No. 10,636 (Feb. 11, 1974), 39 Fed. Reg. 7806, 7806-07 (Feb. 28, 1974) ("1974 Rule Proposal"); Certain Manipulative Practices in Public Offerings, Supplemental Notice of Proposed Rulemaking, Exchange Act Release No. 11,328 (Feb. 11, 1975), 40 Fed. Reg. 16,090, 16,090 (Apr. 9, 1975) ("Supplemental 1974 Proposed Rule"). The SEC withdrew the rule, however, because the tie-in arrangements prohibited by it were already prohibited by "existing

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75,783. "The Commission has long considered tying the award of allocations of offered shares to additional consideration to be fraudulent and manipulative, and such practices have always been actionable under Section 17(a) of the Securities Act and Section 10(b) and Rule 10b-5 of the Exchange Act." *Id.* at 75,784; *see also id.* at 75,785 n.104.

In exchange for receiving an IPO allocation, certain tie-in arrangements require customers to place orders for aftermarket shares of the same security offered in the IPO. *See* 2005 Guidance Statement, 70 Fed. Reg. at 19,672-73. These sorts of arrangements—sometimes described as arrangements to "pre-sell the aftermarket"[11]—can create artificial demand. They "generate[] additional aftermarket buying activity that is manipulative, in that it is designed to push the price higher once the security comes to the market." 2 HAZEN, *supra* § 6.3[2][A], at 1. Buying pressure created by pre-selling the aftermarket spills over into the IPO. *See* Staff Legal Bulletin No. 10. For some time, the SEC has

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antifraud and anti-manipulation provisions of the federal securities laws." Withdrawal of Proposed Rules Under the Securities Exchange Act of 1934, Exchange Act Release No. 26,182 (Oct. 14, 1988), 53 Fed. Reg. 41,206, 41,207 (Oct. 20, 1988) ("1988 Withdrawal"); *see also* 2004 Proposed Amendments, 69 Fed. Reg. at 75,784.

[11] *See* 2 HAZEN, *supra* § 6.3[2][A], at 30-31 ("Under this manipulation, registered representatives . . . require or encourage customers to commit to purchasing shares in the after market in order to get part of the allotment out of the original issue."); *id.* § 6.3[2][A], at 34-35 & n.68; NASDR, *Disciplinary Actions Reported for April*, 1999 WL 33176514, at *16 (NASDR Apr. 1999) ("The preselling of the aftermarket" occurred where respondents "solicited customers to purchase securities in aftermarket trading as a requirement to purchase in the IPO . . . .").

specifically recognized these arrangements as prohibited.[12] *See, e.g.*, 2005 Guidance Statement, 70 Fed. Reg. at 19,674.

A variation on tie-in agreements effectuating a pre-sale of the aftermarket are arrangements called "laddering." *See, e.g.*, 2005 Guidance Statement, 70 Fed. Reg. at 19,674 & n.29; "NASD Board Approves Proposed Conduct Rules for IPO Activities," NASD Press Room (NASD July 25, 2002), *available at* http://www.nasd.com/web/idcplg?IdcService=SS_GET_PAGE&ssDocName=NASDW_002921. Laddering has been defined "as inducing investors to give orders to purchase shares in the aftermarket at pre-arranged, *escalating prices* in exchange for receiving IPO allocations . . . ." 2005 Guidance Statement, 70 Fed. Reg. at 19,674 n.29 (emphasis added). Even more than pre-sales of the aftermarket, laddering agreements "stimulate[] demand for a hot issue in the aftermarket, thereby facilitating the process by which stock prices rise to a premium." REPORT OF THE SEC CONCERNING THE HOT ISSUES MARKETS 37-38 (Aug. 1984) ("Hot Issues Markets"); *see also* 2 HAZEN, *supra* § 6.0, 2005 Supp. at 31. "This conduct distorts the offering and the aftermarket." 2005 Guidance Statement, 70 Fed. Reg. at 19,674 n.29 (quotation marks, alterations, and citations omitted). The SEC has identified laddering

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[12] In 1961, the SEC addressed the impropriety of aftermarket pre-sale tie-in arrangements. *See* Securities Act Release No. 4358, Exchange Act Release No. 6536, 1961 WL 61584, at *1 (Apr. 24, 1961). The Commission understood that certain underwriters in IPOs had "been making allotments to their customers only if such customers agreed to make some comparable purchase in the open market after the issue is initially sold." *Id.* The SEC used the statement to warn dealers that "generally speaking any such arrangement involved a violation of the anti-manipulative provisions of the Securities Exchange Act . . . and may involve violation of other provisions of the federal securities laws." *Id.*

agreements as a serious and harmful means of manipulation that "violates the antifraud and antimanipulation provisions of the federal securities laws." Hot Issues Markets 37-38;[13] *see also* 2005 Guidance Statement, 70 Fed. Reg. at 19,674.

II

With this background in mind, we turn to plaintiffs' complaints. The present appeal is the product of repeated consolidation. By an order entered November 1, 2001, the district court consolidated nine separate actions into a proceeding captioned "In re Initial Public Offering Antitrust Litigation" and appointed five law firms to lead the litigation. The resulting complaint (the "consolidated complaint") alleged violations of the Sherman Act and state antitrust laws. Along with that consolidated class action, the district court considered a separate class action captioned "Pfeiffer *v.* Credit Suisse First Boston Corp." *See IPO Antitrust Litig.*, 287 F. Supp. 2d at 499. The *Pfeiffer* action alleged violations of the Robinson-Patman Act. The district court dismissed both actions in a single judgment, and we review that dismissal in this consolidated appeal.

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[13] In its Hot Issues Markets report, the SEC pointed to its 1961 statement, Securities Act Release No. 4358, Exchange Act Release No. 6536, 1961 WL 61584, as evidence that, "as early as 1961, the Commission indicated that tie-ins involve violation of the antimanipulative provisions of the securities laws." 1984 Hot Issues Markets 38 n.45. The report then documented a case in which a broker-dealer "required a substantial number of its customers to place aftermarket purchase orders for the company's stock at substantial premiums above the . . . offering price as a quid pro quo for obtaining shares in the underwriting." *Id.* at 39. The manipulation allowed the broker-dealer to quadruple the per share price "only a few hours after the commencement of aftermarket trading." *Id.* The report characterized this activity as involving "violations of various antifraud provisions." *Id.* at 38.

A

The plaintiffs in the consolidated complaint represent two groups of injured parties: direct IPO purchasers and aftermarket purchasers. The direct IPO purchasers claim to have paid anticompetitive charges for the securities of certain technology-related companies (the "class securities").[14] The complaint outlines a conspiracy among ten underwriting firms alleged to be leading underwriters of equity IPOs generally and, more specifically, leading underwriters of IPOs of technology-related companies.[15] The firms dominated or had market power in the markets of general equity IPOs and technology-related IPOs. According to the consolidated complaint, these firms agreed to exact anticompetitive consideration from direct IPO purchasers of the class securities in the form of tie-in arrangements. The tie-in agreements would require purchasers either: (1) to pay inflated commissions on trades of other securities, (2) to purchase the issuer's shares in follow-up or secondary public offerings, (3) to purchase less attractive securities, or (4) to execute laddering transactions.[16] "The amount of the required

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[14] The IPOs of these companies' securities range from March 1997 to December 4, 2000, and the securities' issuers include Amazon.com, eBay Inc., Priceline.com Inc., Red Hat Inc., and Global Crossing, among many others.

[15] The defendant firms are Bear, Sterns & Co., Inc., Credit Suisse First Boston Corp. ("CSFB"), Deutsche Bank Alex. Brown, Goldman, Sachs & Co., J. P. Morgan Chase & Co., Lehman Brothers, Inc., Merrill Lynch, Pierce, Fenner & Smith, Inc. ("Merrill Lynch"), Morgan Stanley & Co., Inc., Robertson Stephens, Inc., and Salomon Smith Barney, Inc.

[16] For instance, plaintiffs Michele and Bill Lucia purchased 50 shares of Infonet Services Corp. common stock and 25 shares of Buy.com Inc. directly from Merrill Lynch as part of the Infonet IPO and Buy.com IPO respectively. In both cases, Merrill Lynch (cont'd)

consideration was frequently based upon a percentage of the profits obtained by the customer in connection with the, purchase of IPO shares." Consolidated Am. Compl. ¶ 6. The direct IPO purchasers claim they were injured by the conspiracy to impose these arrangements because, presumably, the conspiracy forced them to pay above-market consideration for securities.

The aftermarket purchasers claim to have purchased the class securities at prices intentionally "inflated" by defendants. Defendants allegedly inflated aftermarket prices by executing laddering agreements with direct purchasers, pre-committing their analysts to issue positive reports following the offering ("booster shots"), and "other overt acts which furthered the conspiracy's objectives by inflating the prices of class securities in the aftermarket." Consolidated Am. Compl. ¶ 61. The aftermarket purchasers claim injury from the purchase of artificially inflated securities.

Both groups of plaintiffs attribute their injuries to violations of section 1 of the Sherman Act and various state antitrust provisions.

B

The class action complaint in *Pfeiffer* asserts that certain underwriter and institutional defendants violated section 2(c) of the Robinson-Patman Act.[17] The complaint alleges that the

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allegedly required the Lucia's to agree to purchase additional shares of the respective securities in the aftermarket at inflated prices and subject to excessive commissions.

[17] The underwriter defendants are CSFB, Goldman, Sachs & Co., Lehman Brothers, Inc., Merrill Lynch, Morgan Stanley Dean Witter & Co., BancBoston Robertson, Stephens, Inc., and Salomon Smith Barney, Inc. The institutional defendants are Fidelity (cont'd)

underwriter defendants paid bribes to, or accepted bribes from, the institutional defendants, in a course of conduct designed to inflate the price of particular securities. The plaintiff class claims injury from the aftermarket purchase of inflated securities.

The purported "bribes" consisted of underwriter promises to make "exceptionally large" allocations of IPO securities in return for the institutional defendants' promises to comply with rules set by the underwriter defendants for the resale of the securities and to divide profits with them. Pfeiffer Compl. ¶¶ 74-75. The institutional defendants allegedly made several agreements: (1) that they would not sell the securities until ordered to do so by the underwriter defendants; (2) that they would give a third of profits made from the allocation to the underwriter who made the allocation; and (3) that they would make additional large aftermarket purchases of the securities and not sell those additional purchases until ordered to do so by the syndicate. Defendants—both the underwriter and institutional defendants—agreed that their research departments would issue continuous "strong buy," "buy" or "outperform" recommendations for the securities. Pfeiffer Compl. ¶ 91-101.

The complaint alleges that these actions had the effect of sustaining prices and driving them upwards. "When the market price for the . . . security had reached a high level and been sustained at the high level as long as it could, the syndicate departments for the Underwriter Defendants notified the Institutional Defendants that they were free to

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Distributors, Fidelity Brokerage Services LLC, Fidelity Investments Institutional Services Co., Inc., Janus Capital Corp., Comerica, Inc., Van Wagoner Capital Management, Inc., and Van Wagoner Funds, Inc.

sell." Pfeiffer Compl. ¶ 108. The underwriter defendants then calculated the share of the profit due and collected those profits by receiving major business from the institutional defendants regarding unrelated securities and by charging the institutional defendants unusually large commissions.

C

Defendants moved to dismiss the complaints pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. They argued that dismissal was proper because federal securities laws repealed the federal antitrust laws by implication and, moreover, preempted state antitrust laws. Defendants presented the immunity question as a choice between two regimes. The first, the antitrust laws, operate under a "competition-only standard." Tr. 12. The operation of the second, the securities laws, is reflected in the SEC's mandate to consider competition with the protection of investors, efficiency, and capital formation.[18] Defendants reminded the

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[18] Section 2(b) of the Securities Act provides:

> CONSIDERATION OF PROMOTION OF EFFICIENCY, COMPETITION, AND CAPITAL FORMATION.—Whenever pursuant to this title the Commission is engaged in rulemaking and is required to consider or determine whether an action is necessary or appropriate in the public interest, the Commission shall also consider, in addition to the protection of investors, whether the action will promote efficiency, competition, and capital formation.

Securities Act § 2(b) (as amended by the National Securities Market Improvement Act of 1996 ("NSMIA"), Pub. L. No. 104-290, § 106(a), 110 Stat. 3416, 3424) (codified at 15 U.S.C. § 77b(b)). Section 3 of the Exchange Act and section 2 of the Investment Company Act of 1940 contain similar provisions. *See* Exchange Act § 3(f) (as amended by NSMIA § 106(b), 110 Stat. at 3424-3425) (codified at 15 U.S.C. § 78c(f)); Investment Company Act of 1940, Pub. L. No. 76-768, § 2, 54 Stat. 789, 790 (as (cont'd)

court that "the IPO allocation process is . . . at the very heart of what the SEC regulates in promoting the capital raising function of the market" and that a syndicate making "a fixed price offering can be regarded as a per se antitrust violation unless it has the umbrella of regulatory protection." Tr. 7-8, 17. They argued that, because "exactly how far that umbrella extends is precisely the question of what the defendants can do in the capital raising function," antitrust immunity should cover the alleged conduct, and the court should thus reserve the question of appropriate capital raising activities for the expert agency, the SEC. Tr. 17. The SEC submitted an amicus curiae memorandum in support of defendants' immunity argument and noted "its past and continuing regulation of the IPO process, the syndicate system and various normally anticompetitive price stabilization techniques." *IPO Antitrust Litig.*, 287 F. Supp. 2d at 506.

The plaintiffs viewed defendants' arguments as "all red herrings." Tr. 31. They urged that the district court did not have to usurp the policy position of the SEC or engage in rulemaking or line-drawing because defendants' misconduct had always been prohibited by the securities laws, was prohibited by the SEC, and, moreover, could never be permitted by the Commission. They argued that Congress created no express exemption to the application of the antitrust laws to defendants' anticompetitive behavior; finding implied immunity would be inappropriate since a repeal of the antitrust laws was not "necessary to make [the securities laws] work," *Silver v. New York Stock Exch.*, 373 U.S. 341, 357 (1963). The United States (via the Department of Justice) and the State of New York (through the Office of

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amended by NSMIA § 106(c), 110 Stat. at 3425) (codified at 15 U.S.C. § 80a-2(c)).

the Attorney General) made amicus curiae submissions in support of plaintiffs' position. *See IPO Antitrust Litig.*, 287 F. Supp. 2d at 506.

The district court granted the motion to dismiss. *See id.* at 499, 524-25. The court noted that the SEC explicitly permits much of the background conduct alleged in the complaints, including, most clearly, the syndicate system, *id.* at 506-08, the "road show" process, *id.* at 508-09, and communications among underwriters via the NASD and securities exchanges, *id.* at 509-10. The court thoroughly canvassed the SEC's relevant regulatory authority—including its exemptive powers—and the Commission's prior consideration of rules targeting the type of misconduct alleged. *Id.* at 510-21. The court held that implied immunity was appropriate because "the SEC, both directly and through its pervasive oversight of the NASD and other SROs [self-regulatory organizations[19]], either expressly permits the conduct alleged in [the complaints] or has the power to regulate the conduct such that a failure to find implied immunity would 'conflict with an overall regulatory scheme that empowers the [SEC] to allow conduct that the antitrust laws would prohibit.'" *Id.* at 523 (quoting *Miller v. Am. Stock Exch., Inc. (In re Stock Exchs. Options Trading Antitrust Litig.)*, 317 F.3d 134, 149 (2d Cir. 2003) (second alteration in original)); *see also id.* at 524. The court dismissed the state claims on the theory that "reason and common sense compel the conclusion that the same conduct that is immune from Sherman Act antitrust scrutiny must also be immune from state antitrust scrutiny." *Id.* at 524; *see also In re Initial Pub. Offering Antitrust Litig.*, 2004 U.S. Dist. LEXIS 6248, Nos. 01 Civ. 2014(WHP), 01

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[19] "The term 'self-regulatory organization' means any national securities exchange, registered securities association, or registered clearing agency . . . ." Exchange Act § 3(f) (as amended) (codified at 15 U.S.C. § 78c(a)(26)).

Civ. 11420(WHP), 2004 WL 789770 (S.D.N.Y. Apr. 13, 2004) (denying motion to reconsider dismissal of state claims). Plaintiffs appeal.

III

The focus of this appeal is defendants' assertion of implied immunity. Thus, a review of the law of implied immunity is in order.

A

The basic contours of implied antitrust immunity jurisprudence are well-established. The analysis begins with the "cardinal principle of construction that repeals by implication are not favored." *Silver*, 373 U.S. at 357 (quoting *United States v. Borden Co.*, 308 U.S. 188, 198 (1939)); *see Gordon v. New York Stock Exch.*, 422 U.S. 659, 682 (1975); *California v. Fed. Power Comm'n*, 369 U.S. 482, 485 (1962). "The antitrust laws represent a 'fundamental national economic policy,'" *Nat'l Gerimedical Hosp. & Gerontology Ctr. v. Blue Cross of Kansas City*, 452 U.S. 378, 388 (1981) (quoting *Carnation Co. v. Pac. Westbound Conference*, 383 U.S. 213, 218 (1966)), and though, "to be sure, where Congress did intend to repeal the antitrust laws, that intent governs, . . . this intent must be clear," *id.* at 389 (citations omitted). Implied immunity will be found only in the face of a "plain repugnancy between the antitrust and regulatory provisions," *Gordon*, 422 U.S. at 682 (quoting *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 350-51 (1963)); *see Wood v. United States*, 41 U.S. (16 Pet.) 342, 363 (1842), only if the repeal is necessary to make the regulatory provisions work, *see Silver*, 373 U.S. at 357, "and even then only to the minimum extent necessary," *id. See In re Stock Exchs. Options Trading Antitrust Litig.*, 317 F.3d at 145, 148. Despite these undisputed first principles, "the implied immunity cases resist definitive harmonization." 1A PHILLIP E. AREEDA & HERBERT HOVENKAMP,

ANTITRUST LAW 39 (2d ed. 2000); *see Phonetele, Inc. v. Am. Tel. & Tel. Co.*, 664 F.2d 716, 727 (9th Cir. 1981).[20]

Our starting point is *Silver v. New York Stock Exchange*, a decision resolving an action by Harold Silver against the NYSE. 373 U.S. at 343, 345; *see Gordon*, 422 U.S. at 683 ("The starting point . . . [is] *Silver*."). Silver founded two non-member firms that sought wire connections with NYSE members. *Silver*, 373 U.S. at 343-44. The NYSE constitution provided the Exchange with the power to approve or disapprove any application for wire connections with any non-member and the ability to require the discontinuance of any connections. *Id.* at 354, 355 n.11. The NYSE granted certain member firms "temporary approval" to establish wire connections with Silver's companies but later decided to withdraw that approval. *Id.* at 344. The Exchange did not give notice prior to its decision to either Silver or his firms, and Silver sued the NYSE for violating the Sherman Act by conspiring with members to deprive Silver's firms of their private wire connections. *See id.* at 344-45. The Supreme Court presented the fundamental issue as "whether the Securities Exchange Act had created a duty of exchange self-regulation so pervasive as to constitute an implied repealer of our antitrust laws, thereby exempting the Exchange from liability . . . ." *Id.* at 347.

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[20] The Ninth Circuit's opinion in *Phonetele*—the holding of which accords with our opinion in *Northeastern Telephone Co. v. American Telephone and Telegraph Co.*, 651 F.2d 76 (2d Cir. 1981), *see Phonetele*, 664 F.2d at 719 n.1—was authored by then-Circuit Judge Anthony Kennedy. Of implied immunity, Judge Kennedy wrote, "One point must be plain: we must recognize there is no simplistic and mechanically universal doctrine of implied antitrust immunity; each of the Supreme Court's cases is decisively shaped by considerations of the special aspects of the regulated industry involved." *Id.* at 727.

The *Silver* Court examined the tension between the free competition principles animating the antitrust statutes and "the public policy of self-regulation," *id.* at 367, created by the Securities Exchange Act, a policy that, "beginning with the idea that the Exchange may set up barriers to membership, contemplates that the Exchange will engage in restraints of trade . . . ."[21] *Id.* at 360. This tension, while problematic, did not imply that the Exchange should be totally exempt from the antitrust laws. *See id.* Specifically, in Silver's case, the SEC lacked the ability to review the challenged Exchange order. *See id.* at 358 & n.12, 360. The Court declined to find an implied repeal in the absence of anything "built into the regulatory scheme which performs the antitrust function of insuring that an exchange will not in some cases apply its rules so as to do injury to competition which cannot be justified as furthering legitimate self-regulative ends." *Id.* at 358. It explained that "some form of review of exchange self-policing . . . [is] not at all incompatible with the fulfillment of the aims of the Securities Exchange Act," *id.* at 359, and that, at least in the absence of SEC review, the Court would apply the antitrust laws. *Id.* at 359-60. In a footnote, the Court stated that "a different case would arise" if the Commission had the power to review a challenged exchange action. *See id.* at 358 n.12.

Silver might be read to suggest the general principle that agency power to review—or, more specifically, to approve—private conduct immunizes that conduct from the antitrust laws, especially, perhaps, when the reviewing agency is

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[21] "The very purpose of an exchange is to exclude nonmembers from participation in trading. Were it not for the legislative authorization of such exchanges, they would constitute group boycotts that are *per se* violations of the Sherman Act." *Ricci v. Chicago Mercantile Exch.*, 409 U.S. 289, 314 (1973) (Marshall, J., dissenting).

concerned with competition. But Supreme Court precedents following *Silver*—in particular, *United States v. Philadelphia National Bank*, 374 U.S. 321 (1963) and *Otter Tail Power Co. v. United States*, 410 U.S. 366 (1973)—are to the contrary. *See* 1A AREEDA & HOVENKAMP, *supra*, at 11 ("The courts have made clear that even an express statutory mandate that an agency consider and give weight to preserving competition does not mean that a transaction approved by the agency confers an antitrust immunity."); *cf. Md. & Va. Milk Producers Assoc. v. United States*, 362 U.S. 458, 462-68 (1960); *United States v. Borden Co.*, 308 U.S. 188, 205-06 (1939).

Philadelphia National Bank, decided the same year as *Silver*, most clearly refutes this attractively simple reading of *Silver*. There, the Court refused to find implied antitrust immunity in a provision of the Bank Merger Act directing the Comptroller of the Currency to review and approve certain mergers in the public interest and, in so doing, to consider "the effect of the transaction on competition (including any tendency toward monopoly)."[22] *Philadelphia Nat'l Bank*, 374 U.S. at 332 n.8 (quoting the Bank Merger Act, Pub. L. No. 86-463, 74 Stat. 129, 129 (1960), *amended* by Act of Feb. 21, 1966, Pub. L. No. 89-356, 80 Stat. 7 (1966)). Specifically, the Court rejected the argument that the Bank Merger Act immunized Comptroller-approved mergers from section 7 of the Clayton Act.[23] *Id.* at 351. The Court

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[22] The Court noted that, under the Act, the Comptroller could "not give his approval [over a merger] until he has received reports from the other two banking agencies [(the Federal Deposit Insurance Corporation and the Federal Reserve System)] and the Attorney General respecting the probable effects of the proposed transaction on competition." *Id.* at 332.

[23] At the time that *Philadelphia National Bank* was under consideration, section 7 provided that

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declined to adopt the view of dissenting Justice Harlan that, because the commercial banking industry occupied a crucial role in the economy and had intimate connections to government operations, Congress had decided to remove antitrust issues from the courts and "place the responsibility for approval squarely on the banking agencies" for whom "competition was *not to be the controlling factor* in determining whether to approve a bank merger." *Id.* at 380, 382-83 (Harlan, J., dissenting).

Instead, Justice Brennan, writing for the Court, explained that the Bank Merger Act did not give rise to a sufficiently strong implication of repeal. The Court emphasized that Congress in other settings had expressly given agencies the power to grant immunity from the antitrust laws. *See id.* at 350& n.27 ("No express immunity is conferred by the Act . . . Contrast this with the express exemption provisions of, *e.g.*, the Federal Aviation Act, Federal Communications Act, Interstate Commerce Act, Shipping Act, Webb-Pomerene Act, and the Clayton Act itself." (citations omitted)). It also noted that the approval process did not require a factfinding process and that the Comptroller, although required to consider the effect of the merger on competition, was not

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> no corporation . . . shall acquire . . . the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.

Philadelphia Nat'l Bank, 374 U.S. at 323 n.1 (quoting 15 U.S.C. § 18 as that section read at the time).

required to give a particular weight to that consideration. Lastly, the legislative history failed to support or compel antitrust immunity:

> Although the Comptroller was required to consider effect upon competition in passing upon appellees' merger application, he was not required to give this factor any particular weight; he was not even required to (and did not) hold a hearing before approving the application; and there is no specific provision for judicial review of his decision . . .
>
> Nor did Congress, in passing the Bank Merger Act, embrace the view that federal regulation of banking is so comprehensive that enforcement of the antitrust laws would be either unnecessary, in light of the completeness of the regulatory structure, or disruptive of that structure . . . The fact that the banking agencies maintain a close surveillance of the industry with a view toward preventing unsound practices that might impair liquidity or lead to insolvency does not make federal banking regulation all-pervasive, although it does minimize the hazards of intense competition.

Id. at 351-52. Whereas *Silver* suggested that an agency's attention to competitive concerns might weigh in favor of implied repeal, *Philadelphia National Bank* found the opposite: "That there are so many direct public controls over unsound competitive practices in the industry *refutes* the argument that private controls of competition are necessary in the public interest and ought therefore to be immune from scrutiny under the antitrust laws." *Id.* at 352 (emphasis added). The Court left open the possibility that implied repeal might operate in other regulated industries, noting, for instance, that "bank regulation is in most respects less complete than public utility regulation." *Id.*

Yet, the Court refused to find implied antitrust immunity when a case concerning public utility regulation arose. *See*

Otter Tail Power Co., 410 U.S. at 372-75. In *Otter Tail Power*, the United States charged that Otter Tail Power had, *inter alia*, refused to interconnect its facilities with municipal utilities and to sell power to those utilities at wholesale. *Id.* at 368, 371. Section 202(b) of the Federal Power Act, 74 Pub. L. No. 333, ch. 687, Title II, § 213 (1935), 49 Stat. 848 (codified as amended at 15 U.S.C. § 824a(b)), authorized the Federal Power Commission ("FPC") to order Otter Tail Power to make a physical connection with, and to sell to or exchange power with, certain municipal utilities. *See Otter Tail Power*, 410 U.S. at 371, 373, 375-76 n.7. The FPC had actively considered the question of whether to permit Otter Tail Power to refuse to connect or whether to order interconnection and dealing, asking whether an order would be "necessary or appropriate in the public interest." *Otter Tail Power*, 410 U.S. at 371-73, 377. The Court explained that antitrust considerations could be relevant, though not determinative, to this "public interest" decision. *Id.* at 373. However, the *Otter Tail Power* Court found "no basis for concluding that the limited authority of the Federal Power Commission to order interconnections was intended to be a substitute for, or to immunize Otter Tail from, antitrust regulation for refusing to deal with municipal corporations." *Id.* at 374-75. In reaching this conclusion, the Court first noted that FPC's authority to order interconnections was insufficient to oust antitrust laws: "Activities which come under the jurisdiction of a regulatory agency nevertheless may be subject to scrutiny under the antitrust laws." *Id.* at 372. Then, like the *Philadelphia National Bank* Court, the Court looked to legislative history. *Id.* at 373-74. It found "nothing in the legislative history which reveals a purpose to insulate electric power companies from the operation of the antitrust laws."[24] *Id.* at 373-74.

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[24] Even the dissent found the legislative history of predominant (cont'd)

Thus, in two cases involving agency review of private behavior—in which neither, unlike *Silver*, involved the actions of a registered exchange—the Court declined to find implied immunity despite agency considerations of competition. Both cases turned, at least in part, on the Court's stated inability to conclude that Congress had intended to immunize the reviewed acts.

The "different case" that *Silver* predicted finally came in *Gordon v. New York Stock Exchange*, an action concerning, like *Silver*, registered exchanges and specifically challenging the fixed-rate commissions of the NYSE and the American Stock Exchange ("AMEX").[25] *Gordon*, 422 U.S. at 660-61,

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import; it simply read the legislative history differently. *See id.* at 390-91 n.7 (Stewart, J., dissenting) ("For me, . . . the legislative history . . . is dispositive.").

[25] To be precise, the Court first discovered *Silver*'s "different case" in *Ricci v. Chicago Mercantile Exchange*, 409 U.S. 289, 302 (1973). In *Ricci*, the Supreme Court was presented with the question of whether consideration of an antitrust action against the Chicago Mercantile Exchange had to be stayed pending administrative proceedings before the Commodity Exchange Commission. *Id.* at 290-91. The *Ricci* Court termed "recurring" the problem of "conduct seemingly within the reach of the antitrust laws [that] is also at least arguably protected or prohibited by another regulatory statute enacted by Congress," where "often, but not always, the other regime includes an administrative agency with authority to enforce the major provisions of the statute in accordance with that statute's distinctive standards, which may or may not include concern for competitive considerations." *Id.* at 299-300. However, the *Ricci* Court never reached the implied immunity question. *See id.* at 302-04; *see also id.* at 308 (Burger, C.J., concurring and providing the fifth vote for the majority judgment) ("The Court's opinion should not be read to suggest that the Commission's resolution of the dispute either will or will not

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685; *cf. Kaplan v. Lehman Bros.*, 389 U.S. 954, 954-56 (1967) (Warren, C.J., dissenting from denial of petition for certiorari). The Court noted that the practice of setting fixed commission rates on stock exchanges began with the Buttonwood Trade Agreement of 1792 that created the NYSE. *Gordon*, 422 U.S. at 663. Congress was aware of the anticompetitive nature of that practice immediately prior to the passage of the Securities Exchange Act but, instead of prohibiting the practice, "gave the SEC the power to fix and insure 'reasonable' rates" in section 19(b)(9) of the Act.[26] *Id.* at 665-66. The *Gordon* Court granted defendants immunity. The case represents the Court's first major decision finding

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foreclose subsequent application of the antitrust laws."); *Gordon*, 422 U.S. at 688 ("*Ricci* . . . did not represent a decision on antitrust immunity . . . .").

[26] Section 19(b) of the Act as originally enacted provided the Commission with express authority to alter exchange rules "in respect of . . . the fixing of reasonable rates of commission." Securities Exchange Act § 19(b)(9), 48 Stat. at 898-99. It also required the SEC to determine that any alterations were "necessary or appropriate for the protection of investors or to insure fair dealing in securities traded." *Id.* at 898. After the action in *Gordon* was filed, the Act was amended to expand SEC review of rules and rule changes by exchanges and other self-regulating organizations. *See* Securities Act Amendments of 1975, Pub. L. No. 94-29, § 16, 89 Stat. 97, 146-50 (amending § 19 of the Securities Exchange Act) (codified as amended at 15 U.S.C. § 78s). The Act was also amended to require that, before the SEC approve the imposition by exchanges of a system of fixed rates, the Commission first conclude that such a system "did not impose any burden on competition . . . taking into consideration the competitive effects of permitting such . . . fixed rates." Securities Exchange Act § 6(e)(1)(B) (as amended by the Securities Act Amendments of 1975, 89 Stat. at 108) (codified at 15 U.S.C. § 78f(e)(1)(B)).

implied antitrust immunity in the securities context; to a great degree it forms the foundation of subsequent implied immunity jurisprudence.

Gordon of course began its appellate journey in the Second Circuit. *See Gordon v. New York Stock Exch.*, 498 F.2d 1303 (2d Cir. 1974). When this Court, like the Supreme Court, found implied immunity appropriate, we declined to rely on the existence of the SEC's review power alone. *Id.* at 1305. Rather, Judge Kaufman, writing for the Court, looked to "the language and the history of the 1934 Act, [which,] together with the sound policy behind supervised exchange self-regulation, mandated the conclusion that Congress intended to exempt from the antitrust laws the exchange practice of fixing commission rates." *Id.* at 1305-06. Of particular significance to us was "the congressional awareness that the provision would permit the Commission to fix rates," an awareness made manifest by the long tradition of fixing rates and the fact that this practice "was repeatedly acknowledged both in committee hearings and in the debates on the Act." *Id.* at 1307 (quotation marks and citations omitted); *see also id.* at 1309 (noting "Congress's expressed declaration"). Judge Kaufman distinguished *Philadelphia National Bank* on the basis of this legislative history.[27] *See id.* at 1310-11 n.11. He also noted that without implied immunity the SEC and antitrust courts could erect "conflicting standards," *id.* at 1307, that a specific provision of the Exchange Act expressly empowered the SEC to regulate rate-fixing, *id.* at 1307, 1310-11 & n.11, and that

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[27] This Court noted "that the history of the Bank Merger Act evidenced a congressional intent not to immunize bank mergers from at least Sherman Act attack, whereas the 1934 Act entrusts the SEC with supervision of rate-fixing, a practice which outside the confines of the 1934 Act is a per se violation of the Sherman Act." *Id.* at 1310-11 n.11 (citations omitted).

there was a robust history of "wide-reaching and systematic . . . recent SEC action regarding rate regulation," *id.* at 1308.[28]

The Supreme Court adopted this approach. Though the Court began by distinguishing *Silver*, it refused to equate SEC review over the challenged exchange conduct with implied immunity. *See Gordon*, 422 U.S. at 685 ("Having determined that this case is, in fact, the 'different case,' we must then make inquiry as to the proper reconciliation of the regulatory and antitrust statutes involved here . . . ."); *see also id.* at 692 (Stewart, J., concurring). It thus acknowledged the fact of SEC regulation and then asked "whether antitrust immunity, as a matter of law, must be implied in order to permit the Exchange Act to function as envisioned by the Congress." *Id.* at 688; *see also id.* at 691 (citing rationales for immunity).

Four interrelated insights informed the *Gordon* Court's conclusion that the Exchange Act "was intended by the Congress to leave the supervision of the fixing of reasonable rates of commission to the SEC." *Id.* at 691. First, the legislative history of the Exchange Act indicated that Congress specifically intended a repeal of the antitrust laws with regard to fixed rates. The Exchange Act, which expressly contemplates fixed commission rates, came seven years after the Court announced that price fixing was a *per se* violation of the Sherman Act, *id.* at 682; *see id.* at 693 (Stewart, J., concurring); *Phonetele*, 664 F.2d at 728; *Jacobi v. Bache & Co.*, 520 F.2d 1231, 1237 (2d Cir. 1975)

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[28] Additionally, the Court noted that "it seemed to us . . . that when something as crucial to the survival of the securities industry as its very ancient rate structure is at stake, diagnoses and changes must come from an agency with the Commission's expertise." *Id.* at 1309.

(Friendly, J.), and the legislative history established that Congress deliberately granted the SEC the express, specific power to fix rates, despite the obvious anticompetitive nature of such a power, *Gordon*, 422 U.S. at 663-67, 681. Second, in the absence of implied immunity, the exchanges might be left between the rock of antitrust liability and the hard place of specific SEC regulations—the exchanges "might find themselves unable to proceed without violation of the mandate of the courts or of the SEC."[29] *Id.* at 689. Third, precluding fixed commission rates "would render nugatory the legislative provision for regulatory agency supervision of exchange commission rates" of section 19(b)(9) by effectively mooting that subsection's provision of SEC review over rates. *Id.* at 691. Finally, the Court linked a history of regulatory approval of fixed rates to the possibility of congressional acquiescence, noting that "continued congressional approval" of the "long regulatory practice" of reviewing and authorizing fixed rates conflicted with any interpretation of the Act that did not imply antitrust immunity, *id.* at 690-91; *cf. id.* at 691-92 (Douglas, J., concurring):

> Since the Exchange Act's adoption, and primarily in the last 15 years, the SEC has been engaged in thorough review of exchange commission rate practices. The committees of the Congress, while recently expressing some dissatisfaction with the progress of the SEC in implementing competitive rates, have generally been content to allow the SEC to proceed without new legislation.

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[29] In a footnote, the Court explained that, although the SEC had never issued a formal order requiring fixed rates, its actions had "an effect equivalent to that of a formal order." *Id.* at 689 n.13.

Id. at 682. In light of these circumstances, repeal by implication was appropriate because it was possible to say that Congress had "unmistakably determined that, until such time as the Commission ruled to the contrary, exchange rules fixing minimum commission rates would further the policies of the 1934 Act." *Id.* at 693 (Stewart, J., concurring).

On the same day that *Gordon* was decided, the Court handed down the final opinion in its trilogy of implied immunity securities cases, *United States v. National Ass'n of Securities Dealers (NASD)*, 422 U.S. 694 (1975), a case involving the conduct of a self-regulatory organization, the NASD, and private anticompetitive conduct. *See id.* at 697. The defendants in *NASD* were the NASD, certain mutual fund companies, mutual fund underwriting firms, and securities broker-dealers trading in mutual fund shares. *Id.* at 700. The United States charged vertical and horizontal restraints of trade.[30] The vertical restraints included various restrictions on the trading of mutual fund shares in the "secondary market"—the market arising outside the "primary

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[30] Courts have discerned two major types of antitrust conspiracies to restrain trade: horizontal and vertical. Horizontal conspiracies involve agreements among competitors at the same level of competition to restrain trade, such as agreements among manufacturers to fix prices for a given product and geographic market, or among distributors to fix prices for a given market. Vertical conspiracies, on the other hand, involve agreements between competitors at different levels of competition to restrain trade, such as agreements between a manufacturer and its distributors to exclude another distributor from a given product and geographic market.

JLM Indus., Inc. v. Stolt-Nielsen SA, 387 F.3d 163, 179 (2d Cir. 2004) (quoting *Crane & Shovel Sales Corp. v. Bucyrus-Erie Co.*, 854 F.2d 802, 805 (6th Cir. 1988)).

market" of the initial distribution of mutual fund shares. *Id.* at 698-703. The Investment Company Act of 1940, Pub. L. No. 76-768, 54 Stat. 789, "required broker-dealers to maintain a uniform price in sales in the primary market to all purchasers except the fund, its underwriters and other dealers." *Id.* at 699. The parties agreed that implied immunity therefore existed with regard to fixed sales in the primary market.[31] *Id.* But the United States charged that various agreements between principal underwriters and broker-dealers, as well as a single agreement between a fund and its underwriter, violated the antitrust laws by requiring maintenance of the public offering price in brokerage transactions and by prohibiting interdealer transactions. *Id.* at 702-03. The defendants agreed that the agreements were aimed at controlling the secondary market but argued they were immune under section 22(f) of the Act. That section provided that mutual fund companies could not restrict the transferability or negotiability of its issued securities "except in conformity with the statements with respect thereto contained in its registration statement nor in contravention of such rules and regulations as the Commission may prescribe . . . ." *Id.* at 721 n.33.

The Supreme Court agreed that immunity was implied in section 22(f). *Id.* at 720-22, 729-30. The Court first found that the section gave the SEC the express authority to regulate and permit restrictions of mutual fund sales in the secondary market, *see id.* at 722-27, and then concluded that this authority implied antitrust immunity, *see id.* at 721-22, 727-30. This conclusion was informed by at least two of the

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[31] A conclusion to the contrary would have left broker-dealers with competing mandates. If they maintained a uniform price, they could violate antitrust laws, but if they did not, they could violate the Investment Company Act. The parties' concession comports with the second insight of the *Gordon* Court.

insights made by the *Gordon* Court. First, congressional intent, as reflected in the legislative history and the structure of section 22 of the Investment Company Act, revealed "a clear congressional determination that, subject to Commission oversight, mutual funds should be allowed to retain the initiative in dealing with the potentially adverse effects of disruptive trading practices." *Id.* at 727. The Court found that "Congress had made a judgment that these restrictions on competition might be necessitated by the unique problems of the mutual fund industry," *id.* at 729; *see id.* at 705-11, 722-27,[32] and concluded that therefore "the antitrust laws [had to] give way if the regulatory scheme established by the Investment Company Act [was] to work," *id.* at 729-30.[33] Second, passage of the Investment Company

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[32] *See also Phonetele,* 664 F.2d at 728 ("It is critical that the restraints so immunized were explicitly contemplated by statute.").

[33] The district court decision affirmed by the *NASD* Court found it "apparent that Congress designed [section 22] to create and protect a primary distribution system which is repugnant to the antitrust laws and did so in complete recognition of the fact that the legislation would frustrate the growth of a free secondary market." *In re Mutual Fund Sales Antitrust Litig.,* 374 F. Supp. 95, 109 (D.D.C. 1973), *aff'd, NASD,* 422 U.S. 694. The Supreme Court substantially agreed. *See NASD,* 422 U.S. at 724. It explained that the Investment Company Act resulted from an intensive study of the mutual fund industry, *id.* at 705-06, in which "the most prominently discussed characteristic [of the mutual-fund market] was the 'two-price system,' which [led to] an active secondary market under conditions that tolerated disruptive and discriminatory trading practices," *id.* at 706. The study revealed that "the two-price system did not benefit the investing public generally," *id.* at 707, and that the system led to a "bootleg market" and price wars that disrupted the established offering prices of mutual funds, *id.* at 709. The Act "was enacted with these abuses in mind." *Id.* at 709. Moreover, section 22(f) of the Act, the subsection in which the Court found implied immunity, had been (cont'd)

Act was followed by what the Court characterized as a long history of SEC acceptance of the anticompetitive behavior.[34] *See id.* at 727-28; *see also Phonetele*, 664 F.2d at 730. This regulatory practice was "precisely the kind of administrative oversight of private practices that Congress contemplated when it enacted § 22(f)." *NASD*, 422 U.S. at 728.

A separate count in *NASD* charged a horizontal conspiracy between the NASD and its members to prevent the growth of a secondary market in mutual fund shares. *Id.* at 701-02, 730. In the count as filed, the United States challenged three particular actions: (1) NASD rules encouraging restrictions on secondary market activities; (2)

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drafted by the SEC and considered by that agency as an "authority necessary to allow regulatory control of industry measures designed to deal with the disruptive effects of 'bootleg market' trading and with other detrimental trading practices identified in the [study]." *Id.* at 722. Funds were already imposing the challenged restrictions at the time that Congress passed the Act, *see id.* at 723, further suggesting that Congress was aware of and approved of the anticompetitive activity.

[34] The Court noted that the SEC "repeatedly had recognized the role of private agreements in the control of trading practices in the mutual-fund industry" and had even "looked to restrictive agreements similar to those challenged in the litigation [and] . . . at no point did it intimate that those agreements were not legitimate." *NASD*, 422 U.S. at 727 (footnote omitted). Indeed, historically, "the Commission had allowed the industry to control the secondary market through contractual restrictions duly filed and publicly disclosed," and "even the SEC's recently expressed intention to introduce an element of competition in brokered transactions reflected measured caution as to the possibly adverse impact of a totally unregulated and restrained brokerage market on the primary distribution system." *Id.* at 728.

NASD interpretations of its rules, similarly encouraging restrictions; and (3) activities of the NASD membership in encouraging the vertical restraints described in the other seven counts. *Id.* at 730-33. The Supreme Court recognized that section 22(f) of the Investment Company Act did not "authorize[]" these horizontal activities. *Id.* at 730. The Government withdrew its challenges on the NASD rules but asserted that "various unofficial NASD interpretations" and "extension[s] of the rules" inhibited a secondary market. *Id.* at 731-32. The Court, separating its analysis between the first two acts (the rules and their interpretations by the NASD) and the third (involving only NASD members), found the entirety of the challenged activities immune. *Id.* at 733-35. The SEC's exercise of regulatory authority was "sufficiently pervasive" to confer an implied immunity over both groups of horizontal activities within the count. *Id.* at 730.

The Court noted that the Government's withdrawal of its challenge to the NASD rules was "prudent." *Id.* at 732. It explained that the NASD's rules were impliedly immune due to the "extensive" "supervisory authority" of the SEC over the NASD. *Id.* at 732. The SEC had the power to determine if the NASD qualified for self-regulation, to review and approve any proposed NASD rules, and to request and order changes in or supplementation of those rules. Moreover, the SEC weighed competitive concerns in reviewing NASD rules and practices:

> Not only does the Maloney Act [(*i.e.*, the legislation that supplemented the SEC's regulation of the over-the-counter markets by providing a system of cooperative self-regulation through voluntary associations of brokers and dealers, such as the NASD)] require the SEC to determine whether an association satisfies the strict statutory requirements of that Act and thus qualifies to engage in supervised regulation of the trading activities of its membership, it requires registered associations thereafter to submit for Commission approval any

> proposed rule changes. The Maloney Act additionally authorizes the SEC to request changes in or supplementation of association rules, a power that recently has been exercised with respect to some of the precise conduct questioned in this litigation. If such a request is not complied with, the SEC may order such changes itself.
>
> The SEC, in its exercise of authority over association rules and practices, is charged with the protection of the public interest as well as the interests of shareholders, and it repeatedly has indicated that it weighs competitive concerns in the exercise of its continued supervisory responsibility.

Id. at 732-33 (citations omitted). The Court concluded that "the investiture of such pervasive authority in the SEC suggests that Congress intended to lift the ban of the Sherman Act from association activities approved by the SEC."[35] *Id.* at 733. Furthermore, because the Court could "see no meaningful distinction between the Association's rules and the manner in which it construes and implements them," that is, because "each was equally a subject of SEC

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[35] As support, the Court relied in part on a footnote in a 1940 opinion by Justice Douglas that stated:

> The typical method adopted by Congress when it has lifted the ban of the Sherman Act is the scrutiny and approval of designated public representatives. . . See the Maloney Act providing for the formation of associations of brokers and dealers with approval of the Securities and Exchange Commission and establishing continuous supervision by the Commission over specified activities of such associations.

United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 227 n.60 (1940) (citations omitted).

oversight," the Court found immunity over the challenged NASD interpretations of its rules as well. *Id.*

Finally, the *NASD* Court turned to the alleged horizontal agreements between the membership by which members sought to encourage restrictions on the secondary market. *Id.* The activities involved—although not authorized by the Investment Company Act, *id.* at 730—included actions to further the restrictions immunized under section 22(f), precisely the restrictions that the SEC had consistently approved pursuant to that section. *Id.* at 733; *see Phonetele, Inc.*, 664 F.2d at 729 & n.35. The "conspiracy" did not have the purpose or effect of restraining competition between funds. *NASD*, 422 U.S. at 733. Rather, as one court has explained, "the defendants horizontal conduct was logically necessary to carry out the legitimate agreements and the sanctioned vertical restraints, if not directly responsive to a regulatory command." *Phonetele*, 664 F.2d at 729. "This close relationship was fatal" to the Government's position. *NASD*, 422 U.S. at 733. The Supreme Court noted that "maintenance of an antitrust action for activities so directly related to the SEC's responsibilities poses a substantial danger that [members] would be subjected to duplicative and inconsistent standards," *NASD*, 422 U.S. at 735, and held the challenge "likewise . . . precluded by the regulatory authority vested in the SEC by the Maloney and Investment Company Acts," *id.* at 733. *NASD* was the Supreme Court's last case on implied antitrust immunity.[36]

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[36] In *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004), however, the Supreme Court mentioned implied antitrust immunity, but only to note that such immunity was not available under the Telecommunications Act of 1996, Pub. L. 104-104, 110 Stat. 56, because that Act contained an antitrust-specific savings clause. *See Verizon Communications*, 540 U.S. at 406; *see also Law Offices of Curtis V. Trinko, L.L.P. v.*

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Much of the remaining judicial action in this area has been here at Foley Square. In addition to our opinion in *NYSE*, we have faced the question of implied immunity primarily in five cases. The first was *Northeastern Telephone Co. v. American Telephone and Telegraph Co.* [(*"AT&T"*)], 651 F.2d 76 (2d Cir. 1981). Northeastern Telephone Company was a small Connecticut company that entered the "interconnect industry" created in the wake of a 1965 Federal Communications Commission ("FCC") ruling. *See id.* at 79-80. That ruling required AT&T to permit customers to connect their own terminal equipment. *See id.*; *see also In re Use of Carterfone Device*, 13 F.C.C.2d 420, *recons. denied*, 14 F.C.C.2d 571 (1968). AT&T filed a proposed "tariff"[37] with the FCC requiring that all terminal equipment be interconnected through a "protective coupler arrangement" provided and serviced by local operating companies. *Northeastern Tel. Co.*, 651 F.2d at 80-81. The FCC allowed the tariffs to take effect without giving any specific approval to them, but, years later, the FCC invalidated the tariff. *Id.* at

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Bell Atl. Corp., 305 F.3d 89, 109 (2d Cir. 2002), *rev'd on other grounds sub nom. Verizon Communs. Inc.*, 540 U.S. 398.

[37] The [Federal Communications Act] provides for the regulation of telecommunications common carriers by the FCC and requires carriers to file tariffs with the FCC covering 'practices' as well as charges. Before changing any of its practices by filing a new tariff, the carrier must give ninety days notice to the FCC and the public. The requirement that carriers file tariffs is the primary mechanism of regulation. Once a tariff becomes effective, the carrier is required to adhere to its provisions.

Phonetele, 664 F.2d at 721-22 (footnotes omitted).

81. Northeastern Telephone Company sued AT&T under the Sherman Act, alleging that the protective couplers had been "intentionally overdesigned, making them unnecessarily expensive and subject to break down." *Id.* AT&T claimed that, because the tariff was subject to review by the FCC, AT&T was immune from antitrust liability. *Id.* at 82.

We rejected this defense. *Id.* Writing for the panel, Judge Kaufman recognized the "conflict between the Sherman Act's mandate of robust competition and the 'public interest' standard underlying governmental regulation of business activity." *Id.* That conflict triggered, but did not resolve, an implied immunity analysis. "The touchstone of this analysis," he emphasized, "is Congressional intent." *Id.* The Court made several important observations. First, the enabling act and its legislative history gave no indication of an intent to repeal. *Id.* at 83. Second, the Sherman Act did not "expressly authorize the FCC to approve protective coupler designs that unreasonably restrict competition" and thus was distinguishable from the provision of the Exchange Act considered in *Gordon* that was precisely targeted at fixing commission rates, an anticompetitive activity. *Id.* Expanding on this point, the Court stated, "While this observation is unsurprising, since protective couplers were unknown [at the time the enabling act was passed], it does rebut appellants' argument that immunity may be inferred on the basis of specific Congressional authorization." *Id.* Third, the Court reviewed the history of FCC regulation and emphasized that, although the agency clearly *could* have approved the couplers, the FCC had never granted its approval. *Id.* at 83-84. Therefore, we refused to immunize the tariff.

We considered implied antitrust immunity again in *Strobl v. New York Mercantile Exchange*, 768 F.2d 22 (2d Cir. 1985). Joseph Strobl asserted antitrust claims against defendants alleged to have fixed the market for potato prices. *Id.* at 23, 26. Defendants argued that their conduct, which violated the Commodity Exchange Act ("CEA"), was

immune under that Act from antitrust liability. *Id.* at 29. We easily rejected this defense because, as we explained, there was no conflict between the antitrust laws and the regulatory scheme erected by the CEA. *Id.* at 27. Moreover, the legislative history did not support an implied repeal. *Id.* at 28-29. The anticompetitive conduct alleged—price manipulation—was specifically forbidden by the CEA, and it was impossible to say that the two regimes were "repugnant" to one another. *Id.* at 27-28.

A more difficult question arose in *Finnegan v. Campeau Corp.*, 915 F.2d 824 (2d Cir. 1990). There, Michael Finnegan, a shareholder of Federated Department Stores, Inc., sued R.H. Macy & Co. ("Macy's") and Campeau Corp. under section 1 of the Sherman Act. *Id.* at 825-26. He alleged that, after Federated Department Stores was "put into play" (*i.e.*, "offered for sale to the highest bidder"), Macy's and Campeau began bidding for the company. *Id.* at 826. However, as the bids climbed, the two companies made a mutually beneficial agreement to end the bidding war, enter a single bid, and split the company upon purchase. *Id.* Although Finnegan claimed that section 1 of the Sherman Act barred the conduct, the defendants asserted antitrust immunity, *id.* at 828, citing section 14 of the Exchange Act, which had been amended by the Williams Act, Pub. Law No. 90-439, 82 Stat. 454 (1968) (codified as amended at 15 U.S.C. § 78n). *Finnegan*, 915 F.3d at 828.

We explained that the Williams Act was directed at the "twin aims" of, first, maintaining neutrality between bidders and target companies and, second, protecting target shareholders by requiring that bidders make certain disclosures. *Id.* at 829. The Williams Act created disclosure requirements by amending section 14(d) of the Exchange Act. *Id.* These requirements were imposed on "person[s]," and the Act defined "person" to include any "group" acting with the purpose of acquiring securities. Williams Act § 3, 82 Stat. 456 (amending Exchange Act § 14(d)(1)-(2) (codified

as amended at 15 U.S.C. § 78n(d)(1)-(2))). The Williams Act also included an antifraud provision, allowing the SEC to regulate tender offers. *See Finnegan,* 915 F.2d at 830; Williams Act § 3, 82 Stat. 457 (amending Exchange Act § 14(e) (codified as amended at 15 U.S.C. § 78n(e))).

We concluded that the Williams Act impliedly repealed the antitrust laws with regard to the group bidding engaged in by Macy's and Campeau. *Id.* at 828. Three types of considerations informed our holding. The first centered on the structure of the Williams Act. Concentrating on amended section 14(d) of the Exchange Act, we found that "the logical implication" of the Act's definition of person to include a group was that the Act "contemplated agreements between bidders"—the very sort of agreement which, according to Finnegan's complaint, created antitrust problems. *Id.* at 829-30. Thus, we concluded, "in order for § 14(d) . . . to function as intended, such agreements [could not] be subject to suit under the antitrust laws . . . ." *Id.* at 830. We then turned to legislative history. We found that permitting joint bids, as long as they were disclosed, comported with the Williams Act's posture of neutrality between bidders, shareholders, and target company management. *Id.* at 831-32. Finally, we looked at the regulatory history. Joint bids were a common practice, and the SEC had permitted such bids so long as they were disclosed. *Id.* at 830-31. In light of all these considerations, we stated that, although the Williams Act would "not foreclose all antitrust claims arising in the context of market manipulation," it had implicitly repealed the Sherman Act in Finnegan's case. *Id.* at 828.

Our next case concerning antitrust immunity was *Friedman v. Salomon/Smith Barney, Inc.*, 313 F.3d 796 (2d Cir. 2002). The class action plaintiffs in *Friedman* were retail investors who had purchased securities in public offerings

and who contended that defendants had conspired to discourage the "flipping"[38] of stocks in an alleged violation of section 1 of the Sherman Act. *Id.* at 797-98. Plaintiffs asserted that defendants discriminated against retail investors with a history of flipping but did not hold institutional investors to the same standard. *Id.* "Although [the] plaintiffs alleged that the conspiracy had given rise to a host of improprieties, the only injury for which they [were] actually suing was the 'inflated' price they paid when they purchased the shares at the offering price." *Friedman v. Salomon/Smith Barney, Inc.*, 2000 WL 1804719, at *3 (S.D.N.Y. Dec. 8, 2000) (citations omitted). Defendants argued that the anti-flipping criteria—their implementation being a form of price stabilization permitted by the SEC—were impliedly immune. *Friedman*, 313 F.3d at 799. Importantly, section 9(a)(6) of the Exchange Act, 48 Stat. at 890 (codified at 15 U.S.C. § 78i(a)(6)), provided the SEC with the express authority to regulate stabilization, permitting or prohibiting stabilizing practices at its discretion. *Friedman*, 313 F.3d at 802-03.

We agreed with the defendants that the Exchange Act had impliedly repealed section 1 of the Sherman Act with regard to the alleged conduct. *Id.* at 803. As we noted, section 9(a)(6) expressly provided for regulation of stabilization practices. *Id.* at 802. Moreover, the SEC had long recognized certain stabilization practices as legitimate, including anti-flipping restrictions, and the restrictions were still permissible under SEC regulations. *Id.* at 801-03. Although

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[38] Flipping is the practice of reselling securities shortly after purchasing them in an IPO, *Friedman*, 313 F.3d at 797, that is, "buying a 'hot issue' and then selling it within a short period of time into a rising market, earning a quick profit on the transactions," *In re Account Mgmt. Corp.*, Exchange Act Release No. 36,314, 60 S.E.C. Docket 962, 1995 WL 579449, at *2 n.3 (Sept. 29, 1995).

the SEC had published a comprehensive review of its trading practice rules and posed certain questions about flipping, it did not choose to prohibit the anti-flipping restrictions in question. *Id.* at 801-02. This reflected a regulatory approach stretching back to 1940 when an SEC release indicated that anti-competitive stabilization practices would be lawful in the absence of Commission regulation. *Id.* at 802. In these circumstances, we found immunity implied in the Exchange Act.[39] *Id.* at 803.

The most recent implied immunity case in this circuit is *Miller v. Am. Stock Exch., Inc. (In re Stock Exchs. Options Trading Antitrust Litig.)*, 317 F.3d 134 (2d Cir. 2003). The plaintiffs in that case were purchasers of equity options who claimed that the defendants, various exchanges and exchange members, had unlawfully restrained trade in violation of section 1 of the Sherman Act by conspiring to restrict the listing and trading of particular options, so as to limit each listing of the option to a single stock exchange at a time. *Id.*

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[39] The *Friedman* court saw a direct analogy to *NASD*. *See id.* at 800 ("The facts in *NASD* are analogous to the case at bar . . . ."). This reference was appropriate because the second half of *NASD* dealt with a situation in which, *inter alia*, private individuals were charged with a conspiracy to engage in activities immunized by statute and permitted by SEC regulations. *See NASD*, 422 U.S. at 733. *NASD* held that, although the SEC could not permit the agreements among competitors to impose restrictions on the secondary market, those agreements remained beyond the realm of antitrust law because their aim was actually encouraged by Commission policies. *Id.* at 733-35. *Friedman* is analogous. The SEC did not have the authority to authorize the horizontal agreements alleged in *Friedman*, but would, and did, permit the anticompetitive conduct that was the purpose of those agreements—the imposition of an anti-flipping stabilization scheme.

at 138. In response, the defendants claimed immunity from the antitrust laws. *Id.* at 139.

We accepted the defendants' claim of immunity. *Id.* at 150. Our opinion highlighted the regulatory history and extensive interplay between the SEC and the exchanges with regard to the exclusivity of options listing. We noted that the SEC had "at times encouraged multiple listing and at times disapproved of that practice," *id.* at 150; *see id.* at 148 ("The Commission has taken varied positions with respect to the appropriateness of multiplicity . . . ."), including, for a time, approving exchange plans "for the single, or exclusive, listing of any new equity option," *id.* at 140. *Cf. Gordon,* 422 U.S. at 689 n.13 ("This degree of scrutiny and approval by the SEC is not significantly different . . . than an affirmative order to the exchanges to follow fixed rates."). Presumably, just as the SEC had approved exchange rules calling for exclusive listings, it could also have compelled such rules. *Compare* 15 U.S.C. § 78s(b)(1) ("No proposed rule change shall take effect unless approved by the Commission . . . ."), *with* 15 U.S.C. § 78s(c) ("The Commission, by rule, may . . . add to . . . the rules of a self-regulatory organization . . . ."). The Court concluded that antitrust principles directly conflicted with the SEC's encouragement and affirmative approval of exchange plans for exclusive listings.[40] *In re*

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[40] Our opinion also included a block quote from the *NASD* Court's discussion of a "pervasive" regulatory scheme. 317 F.3d at 147 (quoting *NASD,* 422 U.S. at 734-35). The characteristics of the SEC's review over the NASD that the Supreme Court termed "pervasive" in *NASD* were similar to characteristics of the exchanges at the time of *In re Stock Exchange Options Trading Antitrust Litigation. See Harding v. Am. Stock Exch., Inc.,* 527 F.2d 1366, 1369 n.4 (5th Cir. 1976). We did not expressly note this similarity.

Stock Exchs. Options Trading Antitrust Litig., 317 F.3d at 150.

The central question in the case was whether antitrust immunity was an available defense when the SEC changed its position to no longer permit exclusive listings. Importantly, we recognized the principle—consistent with the idea that antitrust repeal depends on congressional intent—that it was entirely possible for a practice to be currently prohibited by the SEC even though Congress impliedly repealed the antitrust laws with regard to it. *Id.* at 149. An SEC decision to prohibit certain activities could not logically strip those activities of immunity; if Congress intended to repeal the antitrust laws with regard to exclusive options listings, the SEC's eventual prohibition of that practice would not alter the original intent. *Id.* at 148-50.

C

The cases from the Supreme Court and this Court on implied antitrust immunity yield several principles. As an initial matter, we can parse the operation of immunity into "two narrowly-defined situations." *Id.* at 147 (quoting *Northeastern Tel. Co.*, 651 F.2d at 82). The first situation involves "pervasive regulation," while the second involves potential specific conflicts.

1

The first ground on which a court might find an implied repeal of the antitrust laws is "the vague ground of pervasive regulation." *Northeastern Tel. Co.*, 651 F.2d at 83; *see Mid-Texas Commc'ns Sys., Inc. v. Am. Tel. & Tel. Co.*, 615 F.2d 1372, 1378 n.4 (5th Cir. 1980). An implied repeal of the antitrust laws in this situation may arise "when the regulatory scheme is so pervasive that Congress must be assumed to have forsworn the paradigm of competition." *In re Stock Exchs. Options Trading Antitrust Litig.*, 317 F.3d at 147 (quoting *Northeastern Tel. Co.*, 651 F.2d at 82 (citing *NASD*, 422 U.S. at 730)). This category of repeal is limited by the

"guiding principle that, where possible, 'the proper approach . . . is an analysis which reconciles the operation of both statutory schemes with one another rather than holding one completely ousted.'" *Nat'l Gerimedical Hosp. & Gerontology Ctr.*, 452 U.S. at 392 (quoting *Silver*, 373 U.S. at 357 (alteration in original)).

Few cases have found an implied repeal on this "vague ground." *Northeastern Tel. Co.*, 651 F.2d at 83. The primary illustration of possible pervasive regulation is the situation where the activities of an SRO, extensively regulated by the SEC, are challenged as anticompetitive. *See NASD*, 422 U.S. at 730-33; *see also Austin Mun. Sec., Inc. v. Nat'l Assoc. of Sec. Dealers, Inc.*, 757 F.2d 676, 694-95 (5th Cir. 1985); *cf. In re Stock Exchs. Options Trading Antitrust Litig.*, 317 F.3d at 148-49.

But "pervasive regulation" may also be derivative. For instance, in *NASD* the Supreme Court concluded that horizontal agreements among competing NASD members to encourage vertical restraints in the mutual fund secondary market were entitled to implied immunity because the vertical restraints imposed by these horizontal agreements—which did not have the purpose or effect of restraining competition among funds—had been consistently approved by the SEC. *See NASD*, 422 U.S. at 733. As then-Judge Kennedy explained, the Supreme Court had "reasoned the concerted activity acquired a kind of derivative immunity by virtue of its relation to the immune restraints implemented by the concerted action." *Phonetele*, 664 F.2d at 729 (footnote omitted). The purpose of the challenged conspiracy actually coincided with the aims of the SEC, *NASD*, 422 U.S. at 733, and after the Court determined that the underlying restraints on the secondary market were immune it could then conclude that conduct enforcing those restraints was also immune, *id.* To ascertain whether the underlying vertical restraints were immune, however, the *NASD* Court had to employ the more

common immunity analysis described below. *See id.*; *cf. Friedman*, 313 F.3d at 797-98, 803.

2

The context in which implied immunity most often operates is best seen as one of potential specific conflict. It has been defined broadly as "when an agency, acting pursuant to a specific Congressional directive, actively regulates the particular conduct." *In re Stock Exchs. Options Trading Antitrust Litig.*, 317 F.3d at 147 (quoting *Northeastern Tel. Co.*, 651 F.2d at 82 (citing *Gordon*, 422 U.S. at 685-86, 688-89)). The most prominent examples of this type of immunity include the situation in *Gordon* and the immunity applied under section 22(f) of the Investment Company Act to the vertical restraints considered in *NASD*. All of our cases finding immunity have focused on a potential specific conflict of this nature. *See, e.g.*, *id.* at 150; *Friedman*, 313 F.3d at 802-03; *Finnegan*, 915 F.2d at 828-32; *cf. Strobl*, 768 F.2d at 29; *Northeastern Tel. Co.*, 651 F.2d at 83-84.

As suggested by our label—potential specific conflict—precedents have established that a potential conflict between the antitrust laws prohibiting a specific activity on the one hand and a regulatory regime compelling or permitting that activity on the other is a necessary component of implied immunity of this sort. Conflict will often arise because a regulatory regime operates by standards distinct from those of the antitrust laws. *See, e.g.*, *In re Stock Exchs. Options Antitrust Litig.*, 317 F.3d at 148; *Friedman*, 313 F.3d at 800 (noting that the Exchange Act allows "'a little price manipulation' to further goals such as efficiently raising capital through new issues"); *Finnegan*, 915 F.2d at 829. But an agency's power to review, if coupled with an *obligation to prohibit* particular anticompetitive conduct, will not create conflict. *See Strobl*, 768 F.2d at 27-28; *see also Gordon*, 422 U.S. at 692 (Stewart, J., concurring); 1A AREEDA & HOVENKAMP, *supra*, at 58 ("Ordinarily, the mere power to

prevent anticompetitive conduct will not immunize that conduct from the antitrust laws."). Rather, a conflict may arise when the agency has the *discretion to permit*[41] the activity by accepting or endorsing it as conforming with statutes or regulations particularly within the agency's sweep.

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[41] From a purely textual standpoint, within the word "permit" lurks the danger of assuming away the entire immunity analysis. The word has two possible meanings, one purely descriptive and the other functional, stating a legal conclusion. As a descriptor, permit denotes an agency's act of express or silent approval of some course of conduct. This descriptive use is generally consistent with this Court's and the Supreme Court's use of the verb in precedent. *See, e.g.*, *NASD*, 422 U.S. at 729 (noting the SEC's authority "to permit these and similar restrictive agreements"); *Gordon*, 422 U.S. at 674 ("the SEC permitted amendment to allow competitive rates"); *In re Stock Exchs. Options Trading Antitrust Litig.*, 317 F.3d at 140 (describing SEC's consideration of whether "to permit" multiple options listings); *Friedman*, 313 F.3d at 799 ("The SEC has exercised its statutory authority in permitting—through the deliberate absence of regulation—defendants' conduct . . . .").

But the word "permit"—or its sister verbs "authorize" and "allow"—could also be understood as an equivalent to the verb "immunize": to permit the conduct *despite* the antitrust laws. In this sense it states a legal conclusion—that the SEC immunizes the conduct. We disclaim that usage of the verb here, and we do so to prevent readers from attributing a legal conclusion to a mere recitation of fact. Our use of the word "permit" is thus limited to describing what actions an agency authorizes under its regulatory regime, not, as the ultimate issue may be, under the antitrust laws. Whatever the merits of an immunity doctrine in which agency permission is the endpoint of analysis—and precedent does not support that doctrine, *see Otter Tail Power*, 410 U.S. at 371-76; *Philadelphia Nat'l Bank*, 374 U.S. at 321-33; *Northeastern Tel. Co.*, 651 F.2d at 83-84—we see no merit in harvesting legal principle from the empty wisdom of verbal imprecision.

See Strobl, 768 F.2d at 27-28. Our decision in *In re Stock Exchanges Options Trading Antitrust Litigation* establishes that it does not matter whether the agency currently permits the activity; conflict is possible so long as there is "potential" for the agency to permit it under its regulatory regime. *See In re Stock Exchs. Options Trading Antitrust Litig.*, 317 F.3d at 149; *see also Friedman*, 313 F.3d at 799.

Conflict, however, is simply the essential starting point, and cases regarding potential specific conflicts have remained wedded to the idea that the touchstone of our analysis is, quite necessarily, inquiry into whether there is any evidence of an implicit congressional intent to repeal the antitrust laws. *See Northeastern Tel. Co.*, 651 F.2d at 82. In discerning that intent, courts examining potential specific conflicts have repeatedly turned to the four insights of the *Gordon* opinion. As noted above, the first is that legislative history or statutory structure may demonstrate that Congress contemplated repealing the antitrust laws with regard to specific anticompetitive conduct. *See Gordon*, 422 U.S. at 681-82; *see also NASD*, 422 U.S. at 705-11, 722-27. Thus, in *Friedman*, where we found implied immunity for stabilization practices, we noted that Congress was aware of similar practices when it passed the Exchange Act in 1934.[42] *Friedman*, 313 F.3d at 801; *Friedman v. Salomon/Smith Barney, Inc.*, 2000 WL 1804719, at *6, *11 (S.D.N.Y. Dec. 8, 2000); *see also Finnegan*, 915 F.2d at 829-30; *Phonetele*, 664 F.2d at 729-30.

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[42] The *Friedman* Court also noted that, soon after the passage of the Exchange Act, the SEC indicated its understanding that "anti-competitive practices were lawful in the absence of SEC regulation." 313 F.3d at 802. We stated that, at that early date, "the agency was aware of the antitrust implications of stabilization practices and the potential for direct conflict." *Id.*

The second insight is that a regulatory structure empowering an agency to compel action prohibited by the antitrust laws may imply that the antitrust laws are repealed with regard to that particular action. *See Gordon,* 422 U.S. at 689-90; *see also NASD,* 422 U.S. at 735; *In re Stock Exchs. Options Trading Antitrust Litig.,* 317 F.3d at 150; *Harding v. Am. Stock Exch.,* 527 F.2d 1366, 1369-70 (5th Cir. 1976); *cf. Otter Tail Power Co.,* 410 U.S. at 374 ("When these relationships are governed in the first instance by business judgment and not regulatory coercion, courts must be hesitant to conclude that Congress intended to override the fundamental national policies embodied in the antitrust laws."). "In other words, implied immunity exists where allowing parallel proceedings on antitrust and SEC tracks would subject defendants to conflicting mandates."[43] *Friedman,* 313 F.3d at 801. This insight sometimes overlaps with the doctrine of "conduct-based instrumentality immunity," which provides that actions compelled by a government agency's directives and policies are immune from the antitrust laws. *See Name.Space, Inc. v. Network Solutions, Inc.,* 202 F.3d 573, 580-84 (2d Cir. 2000).

The third recurring insight is that immunity may be appropriate if applying the antitrust laws would moot a statutory provision and rob the SEC of some grant of discretion. *See Gordon,* 422 U.S. at 689-90; *see also Finnegan,* 915 F.2d at 830. *Compare Gordon,* 422 U.S. at 689-90, *with Northeastern Tel. Co.,* 651 F.2d at 83. This

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[43] The Ninth Circuit has made the same insight. *See Phonetele,* 664 F.2d at 733 ("Where conduct is compelled by the regulatory agency, not implying antitrust immunity would be unfair to the regulated entity and would frustrate agency policies."); *cf.* 1A AREEDA & HOVENKAMP, *supra,* at 35 ("Conduct that is specifically *compelled* by the agency acting within its jurisdiction is generally immune.").

principle builds upon two modest assumptions about Congress: (1) that Congress was familiar with federal law, particularly the antitrust laws; and (2) that Congress would not write legislation without any effect. In other words, we do not "assume that Congress was so muddled that it gave with the right hand of securities regulation that which it then took away with the left hand of antitrust law." *Finnegan*, 915 F.2d at 826.

Finally, our cases have consistently looked to a regulatory history permitting, at some point, the challenged anticompetitive conduct. *See, e.g.*, *In re Stock Exchs. Options Trading Antitrust Litig.*, 317 F.3d at 139-42; *Friedman*, 313 F.3d at 800, 802-03; *Finnegan*, 915 F.2d at 831; *Northeastern Tel. Co.*, 651 F.2d at 83-84. The *Gordon* Court cited historical SEC review of fixed commission rates as evidence of continued congressional acquiescence,[44] *see Gordon*, 422 U.S. at 690-91, and a pattern of Commission approval of anticompetitive conduct supports the premise that Congress contemplated agency permission of the

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[44] This was a guiding principle for the Supreme Court majority in *Bob Jones University v. United States*, 461 U.S. 574 (1983). There, the Court held that the "failure of Congress to modify [a series of] IRS ruling[s] . . . , of which Congress was, by its own studies and by public discourse, constantly reminded, and Congress' awareness of the [IRS policy] when enacting other and related legislation make out an unusually strong case of legislative acquiescence in and ratification by implication of the [IRS] rulings." *Id.* at 599. The Court cautioned that "nonaction by Congress is not often a useful guide," *id.* at 600, but explained that in some circumstances it is "hardly conceivable that Congress . . . was not abundantly aware of what was going on," *id.* at 600-01. *See id.* at 607 (Powell, J., concurring). *But see id.* at 612 (Rehnquist, J., dissenting) ("Regardless of our view on the propriety of Congress' failure to legislate we are not constitutionally empowered to act for them.").

particular conduct.[45] The acquiescence argument is strengthened where the anticompetitive behavior is commonly accepted. *See, e.g., NASD,* 422 U.S. at 727-28; *Finnegan,* 915 F.2d at 830. Without fully explaining our underlying rationale, we have nonetheless consistently stressed that "implied immunity analysis requires a fairly fact-specific inquiry into the nature and extent of regulatory action that allegedly conflicts with antitrust law." *Friedman,* 313 F.3d at 799; *see id.* at 801-02 (reviewing regulatory history); *see also Phonetele,* 664 F.2d at 729 (stating that immunity "depends particularly on the specific regulatory history preceding a given lawsuit").

At the close of this arduous review of the law, it is important to recall that an implied immunity analysis always begins with the notion that repeal by implication is disfavored. *See Silver,* 373 U.S. at 357. Nonetheless, implied repeal may arise in the face of a clear repugnancy between antitrust and regulatory provisions but, importantly, only to

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[45] Although neither logically compelled nor universally true, it is probably fair to say that Congress is more likely to have contemplated repealing the antitrust laws with regard to anticompetitive conduct that at some point has been permitted by the SEC than conduct that has never been permitted. This inference flows from the fact that the concerns of an expert agency created by Congress are likely to share many of the concerns of the Congress that created it. *Cf. NASD,* 422 U.S. at 728.

It has also been suggested that "it would hardly be irrational for Congress to make antitrust immunity," at least in some circumstances, "depend on whether an agency actively supervised the challenged conduct," 1A AREEDA & HOVENKAMP, *supra,* at 43; *cf. Gordon,* 422 U.S. at 691-62 (Douglas, J., concurring) (arguing that immunity is only appropriate where "the SEC is actively and aggressively exercising its powers of review and approval"), but that is yet a more subtle implication.

the extent necessary to make the regulatory provisions work. *Id.* at 357. Thus, in the absence of the rare regulatory scheme pervasive enough to indicate that Congress forswore the paradigm of competition, *see NASD*, 422 U.S. at 730-33, immunity can arise only when there is a potential specific conflict between the antitrust laws and a regulatory regime, *see Northeastern Tel. Co.*, 651 F.2d at 82; *see also Strobl*, 768 F.2d at 27-28. In resolving that conflict, we will apply immunity if we determine that Congress contemplated the specific conflict and intended for the antitrust laws to be repealed. That determination is informed by considering (1) congressional intent as reflected in legislative history and a statute's structure; (2) the possibility for conflicting mandates; (3) the possibility that application of the antitrust laws would moot a regulatory provision; (4) the history of agency regulation of the anticompetitive conduct; and (5) any other evidence indicating that the statute implies a repeal.[46] The mere power to "permit" an act as not violating a regulatory mandate does not alone immunize that act. *See Otter Tail Power*, 410 U.S. at 371-76; *Philadelphia Nat'l Bank*, 374 U.S. at 321-33; *Northeastern Tel. Co.*, 651 F.2d at 83-84.

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[46] This list is merely an expansion on the one we provided in *Northeastern Telephone Co.* In that case, Judge Kaufman explained, "Whenever claims of implied immunity are raised, they must be evaluated in terms of the particular regulatory provision involved, its legislative history, and the administrative authority exercised pursuant to it." 651 F.2d at 83. The only gloss we add to this statement is a fleshing out of "the particular regulatory provision involved"—what we have deemed the second and third insights of *Gordon*.

D

One additional note is in order. *Silver* teaches that the securities statutes may alter the antitrust analysis in an antitrust defendant's favor even when those statutes imply no repeal of the antitrust laws. After the *Silver* Court denied the NYSE the defense of implied immunity, *see* 373 U.S. at 360-61, it did not apply the traditional *per se* rules of antitrust law, *see id.* at 347 (explaining that NYSE's actions would normally "constitute a *per se* violation of § 1 of the Sherman Act"); *id.* at 360-61. Applying "the rule of reason," the Court opined that "particular instances of exchange self-regulation which fall within the scope and purposes of the Securities Exchange Act may be regarded as justified in answer to the assertion of an antitrust claim," and asked whether the conduct before it was so justified. *Id.* at 360-61, 364; *see Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Ware*, 414 U.S. 117, 126 (1973). We applied the same analysis to subsequent cases related to exchange regulation, asking whether anticompetitive exchange rules were nonetheless "germane" to the purposes of the securities laws and therefore permissible under the antitrust laws. *See Jacobi v. Bache & Co.*, 520 F.2d 1231, 1237-40 (2d Cir. 1975) (Friendly, J.); *see also Drayer v. Krasner*, 572 F.2d 348, 356-58 (2d Cir. 1978) (Friendly, J.).

Thus, "just as regulatory context may in [some] cases serve as a basis for implied immunity, it may also be a consideration" in the application of antitrust law. *Verizon Communs.*, 540 U.S. at 412 (citation omitted); *see Jack Faucett Assoc., Inc. v. Am. Tel. & Tel. Co.*, 744 F.2d 118, 127 (D.C. Cir. 1984); *S. Pac. Commc'ns Co. v. Am. Tel. & Tel. Co.*, 740 F.2d 980, 999, 1009-10 (D.C. Cir. 1984); *MCI Commc'ns Corp. v. Am. Tel. & Tel. Co.*, 708 F.2d 1081, 1138 (7th Cir. 1983); *Phonetele*, 664 F.2d at 735, 737-38, 740-43; *cf. Litton Sys., Inc. v. Am. Tel. & Tel. Co.*, 700 F.2d 785, 819 (2d Cir. 1983); *Mid-Texas Commc'ns Sys., Inc. v. Am. Tel. & Tel. Co.*, 615 F.2d 1372, 1378-81, 1389-91 (5th Cir. 1980).

Then-Circuit Judge Kennedy recognized in *Phonetele* that, "while a given regulatory scheme may not amount to the degree of necessity required to confer implied immunity on all activities of a regulated entity, some degree of necessity may be established as a matter of fact in individual cases." 664 F.2d at 737. The *Phonetele* decision also stated, "If a defendant can establish that . . . it had a reasonable basis to conclude that its actions were necessitated by concrete factual imperatives recognized as legitimate by the regulatory authority, then its actions did not violate the antitrust laws." *Id.* at 737-38; *see id.* at 740-41 & n.63 (discussing *Silver* and *Jacobi*); *Jack Faucett Associates, Inc. v. American Tel. & Tel. Co.*, 744 F.2d 118, 127; *S. Pac. Commc'ns Co.*, 740 F.2d at 1009.

We need not expound on the extent to which any of these or analogous principles would here preclude or qualify antitrust liability in the absence of implied immunity; the issue is not before us. But we highlight the principle endorsed elsewhere that, as a general matter, "the antitrust laws are not so inflexible as to deny consideration of governmental regulation," *Mid-Texas Commc'ns Sys.*, 615 F.2d at 1385, and that, as a leading treatise has put it:

> Antitrust courts can and do consider the particular circumstances of an industry and therefore adjust their usual rules to the existence, extent, and nature of regulation. Just as the administrative agency must consider the competitive premises of the antitrust laws, the antitrust court must consider the peculiarities of an industry as recognized in a regulatory statute.

1A AREEDA & HOVENKAMP, *supra*, at 12. These authorities "*are not* saying either that the antitrust laws do not apply in th[e particular] regulatory context, or that they somehow apply less stringently there than elsewhere. Rather, [they] are saying that, in light of regulatory rules, constraints, and practices," certain behavior classically deemed anticompetitive might not violate the antitrust laws. *Town of*

Concord v. Boston Edison Co., 915 F.2d 17, 22 (1st Cir. 1990) (Breyer, C.J.); *see Mid-Texas Commc'ns Sys.*, 615 F.2d at 1389-90; *Drayer v. Krasner*, 572 F.2d at 356-58; *Jacobi*, 520 F.2d at 1237-40. Thus, it is possible that where a regulatory regime is "an effective steward of the antitrust function," the federal courts—in their considered application of the principles of antitrust law, rather than through an ousting of that law by statutory implication—may decline to intervene in private conduct because the benefits of intervention could be slight against a realistic assessment of costs. *Verizon Communs*, 540 U.S. at 413-14.

We make this note because the flexibility reflected in cases like *Silver*, *Phonetele*, and *Verizon Communications* lowers the stakes of any implied immunity evaluation. Tension may often develop between traditional antitrust analysis and the operation of a regulatory regime, even where the statute creating the regime carries no implication of a repeal of the antitrust laws. *See, e.g.*, *id.* at 411-15; *Silver*, 373 U.S. at 360-61; *Mid-Texas Commc'ns Sys., Inc.*, 615 F.2d at 1378-81, 1389-91. But a complete ousting of the antitrust laws is not the only means of resolving that tension. As one treatise has commented, although the doctrine of implied immunity is "not broad enough to eliminate every potential conflict between antitrust and regulatory policies," 1A AREEDA & HOVENKAMP, *supra*, at 98, "the antitrust laws are flexible enough to take into account the peculiarities of a regulated industry," *id.* at 7. *See Verizon Communs*, 540 U.S. at 411-12. In light of the flexibility of the antitrust laws, it is possible to maintain the focus of an implied immunity analysis on the question at issue: whether, and to what extent, a statute implies repeal of the antitrust laws.

IV

Against this backdrop of implied antitrust immunity jurisprudence, defendants advance two theories of implied immunity. First, they argue that immunity should be implied because the SEC has jurisdiction over the alleged conduct,

the SEC has actively exercised its authority to regulate the misconduct, and application of the antitrust laws would interfere with the Commission's ability to administer and refine the regulatory scheme. Second, they contend that the SEC's regulatory authority over the challenged conduct is sufficiently pervasive to oust the antitrust laws.[47] Plaintiffs dispute both theories. Plaintiffs' primary claim is that immunity is improper because there is no potential conflict with the securities laws. According to them, defendants cannot establish that the alleged conduct could ever be authorized under those laws.

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[47] Defendants also argue that immunity is appropriate with regard to the allegations arising in the consolidated complaint because the complaint details a host of conduct recognized as legitimate by the SEC—in particular, the use of syndicates and the book-building process. According to defendants, "If implied immunity were denied, plaintiffs would be free to attempt to establish their allegations of an unlawful conspiracy based on inferences from conduct that the SEC views as essential to capital formation." Defendants, however, cite no legal support for their argument, which essentially posits that implied immunity should apply whenever the evidentiary basis for an antitrust claim includes legitimate activity. Defendants ask us to conclude that, where the securities laws do not imply the repeal of the antitrust laws with regard to particular illegitimate anticompetitive conduct, the conduct nonetheless might gain immunity based on the mode of proof. We see no basis for grounding the immunity analysis in evidentiary considerations; the immunity question, after all, is whether "Congress has made a judgment that [certain] restrictions on competition" should be free from antitrust regulation. *NASD*, 422 U.S. at 729. The answer to that question will not vary with different evidentiary strategies. We thus reject defendants' argument. In so doing, we leave to the district court the task of ensuring that defendants do not suffer prejudice from any evidence of their legitimate activities.

A

We begin with defendants' argument that a potential specific conflict necessitates immunity.

1

At the threshold, we are presented with a question of appellate practice. The issue of an implied immunity of this sort was the focal point of the briefing and argument in these cases, but plaintiffs have presented primarily an interpretation of the case law extending antitrust immunity over a broader set of conduct than we find supported by logic and precedent. Specifically, they suggest that immunity applies to whatever conduct the SEC could permit under its regulatory regime and therefore that immunity is inappropriate here because the SEC lacks the power to approve the alleged tie-in arrangements and conspiracies. Thus, they would have us resolve the question of the exact scope of the SEC's authority. We do not find it necessary to do so. Although we would agree with plaintiffs that the SEC must have authority to permit conduct before immunity of this sort attaches to it, we do not agree that, in the common case, the authority to permit, alone, will establish that a statute has impliedly repealed the antitrust laws. Hence, we would turn to a legal framework *more* favorable to plaintiffs than the doctrine they have pressed. Our initial concern is whether it is proper to look past plaintiffs' apparent concession as to the operative doctrinal framework and in turn whether to apply the proper principles of law. It is.

First, this Court unquestionably has the power to do so. It is well-established that "once an issue or claim is properly before a court, the court is not limited to the particular legal theories advanced by the parties, but rather retains the independent power to identify and apply the proper construction of governing law." *Kamen v. Kemper Fin. Servs., Inc.*, 500 U.S. 90, 99 (1991); *see United States Nat'l Bank of Oregon v. Indep. Ins. Agents of Am., Inc.*, 508 U.S.

439, 447 (1993). Accordingly, a concession on a question of law will not bind us. *See United States v. Tortorello*, 533 F.2d 809, 812 (2d Cir. 1976); *see also Squires v. Town of Islip*, 697 F.2d 66, 69 n.5 (2d Cir. 1982).

Second, ignoring plaintiffs' arguable concession is particularly apt here. To apply the immunity doctrine properly would not introduce a separate legal issue, *see, e.g.*, *Virgilio v. City of New York*, 407 F.3d 105, 116 (2d Cir. 2005); *Indep. Ins. Agents of Am., Inc. v. Clarke*, 955 F.2d 731, 733-34, 741-42 (D.C. Cir. 1992), *rev'd on other grounds*, *United States Nat'l Bank of Oregon*, 508 U.S. 439, or even require that we turn to separate precedent. Moreover, resolving the immunity question in the manner the parties propose would require that we delineate what may be the periphery of the SEC's powers, a task we hesitate to undertake. And, by resolving the question of immunity posed by the parties in our own manner, we could in no way be said to be transforming ourselves into a "self-directed board[] of legal inquiry and research," but, rather, would quite clearly act "as arbiters of legal questions presented and argued by the parties before [us]." *Carducci v. Regan*, 714 F.2d 171, 177 (D.C. Cir. 1983) (Scalia, J.).

We simply find that the arguments on both sides proceed from fundamental, if understandable, misinterpretations of applicable precedents. In these circumstances, we refuse to apply the parties' false premises and to engage in the delicate task of setting the contours of SEC power. For us, it would be inappropriate to allow implied immunity—a quite complicated issue with few guiding precedents in this Circuit—to "vary from case to case depending on concessions." *Snider v. Melindez*, 199 F.3d 108, 114 (2d Cir. 1999); *see Mojias v. Johnson*, 351 F.3d 606, 609 (2d Cir. 2003). Thus, we approach the question of immunities arising from potential specific conflicts with the framework established by precedent, not from that arguably stipulated to by the parties.

The parties' dispute, as has been suggested, centers on the scope of SEC power. Defendants forcefully argue, and the district court's opinion masterfully demonstrates, that the SEC has unquestionable jurisdiction over the tie-in agreements underlying plaintiffs' complaints. *See IPO Antitrust Litig.*, 287 F. Supp. 2d at 506-23. Plaintiffs, however, assert that the SEC is unable to permit the alleged manipulation under the securities laws. Defendants vigorously challenge that assertion. This presents a much more difficult question, and the SEC proceeds with caution. Instead of joining defendants to say that the Commission could permit the charged conduct, it offers a qualified double negative—that, in its view, "current precedent does *not* . . . *foreclose* [its] ability in response to future developments to authorize conduct by underwriters that *could be characterized* as a tie-in or laddering." Letter from Amicus Curiae SEC, at 3 (emphasis added).

We need not resolve the bounds of SEC authority. Even if a specific potential conflict could be established, the crux of the implied immunity claim would remain: demonstration that Congress clearly intended a repeal of the antitrust laws. *See Nat'l Gerimedical Hosp. & Gerontology Ctr.*, 452 U.S. at 389; *see also Otter Tail Power*, 410 U.S. at 374-75; *Philadelphia Nat'l Bank*, 374 U.S. at 351-52; *see also Northeastern Tel. Co.*, 651 F.2d at 82; *cf. Gordon*, 422 U.S. at 688, 691. Here, there is no evidence of that intent.

First, there is no legislative history indicating that Congress intended to immunize anti-competitive tie-in arrangements. That fact alone is not determinative, but it does rebut any argument that immunity could be inferred from a specific congressional authorization. *Cf. Northeastern Tel. Co.*, 651 F.2d at 82. In both of the Supreme Court's cases finding implied immunity in the securities context, Congress had contemplated immunizing the specific anticompetitive activity from the antitrust laws. In *Gordon*,

Congress was aware of fixed rates and granted the SEC power to regulate them, *see* 422 U.S. at 685, and in *NASD*, the legislative history revealed that Congress had authorized the SEC to regulate restrictions imposed on trading in the secondary market for mutual funds in order to combat abuses caused by free competition, *see* 422 U.S. at 733. There is no similar legislative history in the case before us.

Second, this is not a case, like *Gordon* or *In re Stock Exchanges Options Trading Antitrust Litigation*, where the securities regime creates the potential for irreconcilable mandates. Quite simply, neither defendants nor the SEC contend that the Commission could compel the anticompetitive conduct the antitrust laws would prohibit. Whereas the Commission might have the power to impose fixed commission rates, *see Gordon*, 422 U.S. at 689-90, or to limit securities options listings to particular exchanges, *see In re Stock Exchs. Antitrust Litig.*, 317 F.3d at 148-50, defendants wisely do not insist upon the Commission's power to force tie-in conspiracies or to force underwriters to offer tie-in agreements linked to IPO allocations.

Third, defendants fail to identify a single provision, sentence, phrase, or word within the securities laws that would be "rendered nugatory" by application of the antitrust laws. *See Gordon*, 422 U.S. at 689-90. As this Court noted in *Gordon*, "the 1934 Act explicitly provided for the *fixing* of reasonable rates of commission." 498 F.2d at 1307 (quotation marks omitted). Application of the antitrust laws would have conflicted with that particularized grant of power to the Commission. Likewise, in *Finnegan* we found that using the antitrust laws to forbid joint bidding would conflict with the Williams Act's instruction that the SEC regulate "group" bids. 915 F.2d at 829-30. Here, by contrast, defendants acknowledge that the laws bringing tie-in agreements under

the SEC's jurisdiction "concern general, undefined subjects like fraud, deception, misrepresentation, and manipulation."[48] Defendants simply cannot identify any power or provision of the securities laws that will be mooted or even significantly curtailed by applying the antitrust laws to the conduct alleged in plaintiffs' complaints.

Finally, in every case in the securities context in which this Court or the Supreme Court has ever found implied antitrust immunity, the courts have done so in the wake of SEC authorization—whether past or present—of the specific anticompetitive behavior. Here, however, it is undisputed that "the Commission has never authorized tying and laddering . . . [or] even considered doing so." Letter from Amicus Curiae Department of Justice, at 2. Defendants argue that the SEC might be able to define "stabilization" under section 9(a)(2) of the Exchange Act to include these arrangements, but the Commission has never done so; rather, it has consistently limited the definition of "stabilization" to stabilizing activities that maintain securities prices or retard their decline, not manipulations that raise prices. *See Stabilizing to Facilitate a Distribution,* Proposed Rulemaking, Securities Act Release No. 6880, Exchange Act Release No. 23,732 (Jan. 3, 1991), 56 Fed. Reg. 814, 814-15 (Jan. 9, 1991) ("Stabilization consists of [conduct] . . . with a view to maintaining the price, or retarding the decline in price, of the security for the purpose of inducing the purchase by other persons of the offered security."); 1940 Statement, 11 Fed. Reg. at 10,973 ("[Stabilization] is, of course, a *negative* type of manipulation since it seeks to retard and not to create *affirmative* market movements."); *id.* at 10,976. *See generally Friedman,* 313 F.3d at 801-03. Moreover, the SEC "has long considered tying the award of allocations of

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[48] The SEC prohibits tie-in arrangements under those general provisions. *See supra* note 10.

offered shares to additional consideration to be fraudulent and manipulative, and such practices have always been actionable under Section 17(a) of the Securities Act and Section 10(b) and Rule 10b-5 of the Exchange Act." 2004 Proposed Amendments, 69 Fed. Reg. at 75,783; *see id.* at 75,784 n.104. The Commission submitted to this Court that "it is difficult to envision the circumstances in which" conduct similar to that alleged in the complaint might be permitted. Letter from Amicus Curiae SEC, at 3. Indeed, when asked by this Court whether application of the antitrust laws could "impede the SEC's ability to regulate or exempt from regulation any underwriters, securities, or transactions," the SEC noted only that "other cases could involve conduct presenting closer questions." *Id.* at 4. The conduct alleged in this case, clearly, is not permitted under SEC regulations.

We find no other indication of congressional intent to repeal the antitrust laws and immunize IPO tie-in agreements. Accordingly, we reject defendants' argument that implied antitrust immunity arises from a potential specific conflict between the antitrust laws and the securities laws.

B

Defendants also press a "pervasiveness" claim as a route to implied immunity. The district court characterized the SEC's authority over the anticompetitive conduct alleged in the complaint as "pervasive" but declined to hold that implied immunity was proper "under the *NASD* scenario." *IPO Antitrust Litig.*, 287 F. Supp. 2d at 506. Defendants urge us to transform that characterization by the district court into our holding. In essence, they contend that immunity is proper here for the same reasons as in *NASD*. They assert that the SEC has the authority, capacity, and willingness to eliminate the misconduct, and that the SEC would weigh competitive concerns in doing so.

Defendants misread *NASD*. As we have explained, the Court's "pervasiveness" holding in *NASD* included two immunity considerations: one arising directly from the particular "pervasive" regulatory relationship between the SEC and the NASD, *NASD*, 422 U.S. at 732-33, and the other arising derivatively from the "fatal," "close relationship" between the alleged conspiracy and conduct the Court had already concluded was not only impliedly immune but actively encouraged by the SEC, *id.* at 733. Pervasive immunity of the second, derivative sort is impossible here, as the securities statutes do not specifically immunize the underlying tie-in arrangements. The only consideration, therefore, is whether the regulations here are "pervasive" like the SEC's regulations of the NASD were held to be in *NASD*.

Furthermore, defendants' attempt to analogize their relationship with the SEC to that at play in *NASD* falls far short. While it is true that both cases present extensive SEC regulation over the alleged misconduct, there is a significant distinction between who is being regulated and why. The *NASD* Court noted that the delegation of "pervasive supervisory authority" to the SEC suggested that Congress intended to lift the ban of the Sherman Act for *association activities approved by the SEC*. *See NASD*, 422 U.S. at 733 (citing *Socony-Vacuum Oil Co.*, 310 U.S. at 227 n.60). The NASD is a self-regulatory organization enjoying a special status that defendants cannot claim.

Indeed, the NASD and the SEC share a relationship that is quite different from SEC regulation of private business activities. The NASD itself serves as a semi-private regulator over the complex and unique securities industry but does so under the ever-watchful and omnipresent eye of the SEC. The SEC's authority over the NASD allows the Commission to review, approve, and order changes in the organization's rules. *Id.* at 732-33. Pervasiveness in this context in *NASD* revealed that the decisions of the regulated (*i.e.*, the NASD) could be seen as the acts of the regulator. Defendants have no

such relationship with the SEC. While their conduct may be subject to regulation and control by the SEC in great detail, that does not mean that the SEC approved those acts as it did in *NASD*.

At its core, defendants' pervasiveness argument is really that the law of antitrust must yield to the complexities of securities regulation in light of the SEC's substantial powers to regulate underwriter misconduct. The district court implicitly adopted this position, stating:

> The SEC, through application of its broad regulatory authority over the spectrum of conduct related to securities offerings, is empowered to regulate the conduct alleged by . . . plaintiffs. It is this sweeping power to regulate that spawns the potential conflict with the antitrust laws that, under *Friedman* and *Stock Exchanges Options*, requires a finding of implied immunity.

IPO Antitrust Litig., 287 F. Supp. 2d at 506. But the teaching of *NASD* is not that sweeping regulatory powers over private conduct render a regulatory scheme so "pervasive" as to immunize that conduct. If so, the vertical agreements charged in *NASD* would have been immunized under the rubric of pervasiveness as well. They were not. Instead, apart from the derivative immunity extended to private conduct pursued in accord with SEC policies, the Court limited pervasiveness to "association activities approved by the SEC." *NASD*, 422 U.S. at 733. Extensive regulation over the private conduct alleged here simply highlights the danger that anticompetitive conduct poses to the securities markets. *Cf. Philadelphia Nat'l Bank*, 374 U.S. at 352 ("The fact that the banking agencies maintain a close surveillance of the industry with a view toward preventing unsound practices that might impair liquidity or lead to insolvency does not make federal banking regulation all-pervasive, although it does minimize the hazards of intense competition."). We will not halt operation of the antitrust laws on the rationale that

the misconduct equally threatens the markets for trading securities.

C

The claim of implied immunity in this case is, in many ways, unlike any we have seen. Tie-in agreements are recognized as means of dangerous manipulation, and there is no indication that Congress contemplated repealing the antitrust laws to protect them. Thus, defendants insist that the SEC could exercise powers—powers the agency refuses to recognize—to immunize conduct that neither Congress nor the agency has ever contemplated permitting.

There may be reasons why Congress might choose to immunize such conduct. The SEC and defendants have vigilantly reminded us that the securities markets *in toto* might be better entrusted to an expert agency than to the federal courts. While we might agree, we do not have the responsibility for making national policy. Congress knows how to immunize regulated conduct from the antitrust laws. To date, it has not done so here either expressly or impliedly. Construing the statutes as written, we find no repeal.

V

One issue remains. The district court determined that "reason and common sense compel the conclusion that the same conduct that is immune from Sherman Act antitrust scrutiny must also be immune from state antitrust scrutiny." *IPO Antitrust Litig.*, 287 F. Supp. 2d at 524. In light of our conclusion that the doctrine of implied antitrust immunity does not shield the alleged misconduct from antitrust scrutiny, this ruling cannot stand. While defendants forward alternate grounds to support the district court's dismissal, we decline to reach them and instead remand for consideration in the first instance by the district court.

VI

For the reasons stated above, the district court's judgment of November 6, 2003 is vacated, and the case is remanded for further proceedings consistent with this opinion.

APPENDIX B

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

IN RE INITIAL PUBLIC OFFERING ANTITRUST LITIGATION

01 Civ. 2014 (WHP), 01 Civ. 11420 (WHP)

November 3, 2003, Decided
November 3, 2003, Filed

MEMORANDUM AND ORDER

WILLIAM H. PAULEY III, District Judge:

In this consolidated class action, two putative classes of plaintiffs seek redress for alleged antitrust injuries suffered as a result of purchasing initial public offering ("IPO") shares of certain technology-related securities (the "Class Securities") at artificially-inflated prices during the "dot-com boom" of the late 1990s. The first putative class (the "Sherman Act Plaintiffs") alleges violations of the Sherman Act, 15 U.S.C. § 1 et seq., and various state antitrust laws, by ten investment banks that underwrote the majority of the technology-related IPOs during this period.[1] The second putative class (the "Robinson-Patman Act Plaintiffs") alleges that these same practices, as well as those favoring long-term investors, constitute commercial bribery under Section 2(c) of the Robinson-Patman Act, 15 U.S.C. § 13(c).

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[1] The ten "Underwriter Defendants" are Bear, Stearns & Co., Inc., Credit Suisse First Boston Corp., Deutsche Bank Alex. Brown, Goldman Sachs & Co., J.P. Morgan Chase & Co., Lehman Brothers, Inc., Merrill Lynch, Pierce, Fenner & Smith, Inc., Morgan Stanley & Co., Inc., Robertson Stephens, Inc. and Solomon Smith Barney, Inc.

Currently pending before this Court is the Underwriter Defendants' consolidated motion, pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, to dismiss this action. For the reasons set forth below, their motion is granted on the ground that the conduct alleged by the Sherman Act Plaintiffs and the Robinson-Patman Act Plaintiffs is impliedly immune from antitrust scrutiny. Any other result would force the defendants to navigate the Scylla of securities regulation and Charybdis of antitrust law.

BACKGROUND

I. The Sherman Act Allegations

The gravamen of the Sherman Act Plaintiffs' Consolidated Amended Class Action Complaint (the "Sherman Act Complaint" or "Sherman Act Compl.") is that the Underwriter Defendants conspired to inflate the aftermarket prices of the Class Securities by using the fixed price equity underwriting system (the "syndicate system") to foist anticompetitive charges, as well as impermissible aftermarket "laddering" and "tie-in" arrangements, on direct purchasers of IPO shares in violation of federal and state antitrust laws. (Sherman Act Compl. ¶ 1.)

Specifically, the Sherman Act Plaintiffs allege that the Underwriter Defendants: (1) "required customers to pay . . . the IPO price for the relevant Class Security plus additional anticompetitive charges" (Sherman Act Compl. ¶ 4(a)); (2) "required customers to agree, in order to obtain IPO shares of Class Securities, to make 'tie-in purchases' of such Class Securities in the aftermarket at levels above the respective IPO prices," a process known as "laddering," in order to artificially inflate the aftermarket prices of the IPOs (Sherman Act Compl. ¶¶ 4(b), 6-7); and (3) utilized the preexisting syndicate system to implement and further their

antitrust conspiracy, through, inter alia, "road shows"[2] and other information sharing activity (Sherman Act Compl. ¶ 5). The anticompetitive activity alleged includes, inter alia, "non-competitively determined commissions on the purchase and sale of other securities, purchases of an issuer's shares in the follow-up or 'secondary' public offerings (for which the underwriters would earn underwriting discounts), commitments to purchase other, less attractive securities, or the laddered purchases." (Sherman Act Compl. ¶ 6.)

According to the Sherman Act Plaintiffs, the purpose and effect of this conspiracy was to: (1) increase the consideration that aftermarket purchasers paid for the Class Securities above the levels that would have existed in a competitive market (Sherman Act Compl. ¶¶ 7-8, 70-74); and (2) create artificial demand for the Class Securities, thereby inflating their price with a concomitant increase in underwriting charges, commissions, and investment banking fees. (Sherman Act Compl. ¶¶ 70-74.) The Sherman Act Plaintiffs also allege violations of various state antitrust laws based on the same conduct. (Sherman Act Compl. ¶¶ 84-109.)

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[2] A "road show" is defined by the NASD as a "series of meetings with potential investors in key cities, designed and performed by a company and its investment banker as the company prepares to go public." NASD: Resources—Glossary, at http://www.nasd.com/ resources/glossary/r.asp. *See also Sandstad v. CB Richard Ellis, Inc.*, 309 F.3d 893, 895 n.1 (5th Cir. 2002) (The "road show" process is "[a] series of presentations to investors describing an upcoming issue of securities. A road show is designed to drum up interest in the issue among potential investors.") (quoting David L. Scott, Wall Street Words 326 (Revised ed. 1997)).

II. The Robinson-Patman Act Allegations

The Robinson-Patman Act Plaintiffs allege violations of Section 2(c) of the Robinson-Patman Act, 15 U.S.C. § 13(c), by most of the Underwriter Defendants, as well as certain institutional investors.[3] In their complaint (the "Robinson-Patman Act Complaint" or "Robinson-Patman Act Compl."), the Robinson-Patman Act Plaintiffs allege the same conduct as the Sherman Act Plaintiffs (Robinson-Patman Act Compl. ¶¶ 56-63, 90, 107-115), but add allegations that the Underwriter Defendants favored long-term investors over "flippers"[4] when allocating "hot issue" IPO shares. (Robinson-Patman Act Compl. ¶¶ 64-71, 74-89.) According to the Robinson-Patman Act Plaintiffs, this preferential treatment "tends to assure an excess of purchasers over sellers and to drive the market price of the securities upward." (Robinson-Patman Act Compl. ¶ 67.) The Robinson-Patman Act Plaintiffs further allege that the Institutional Defendants agreed not to "flip" their shares in exchange for favorable IPO allocations, and paid or received money for such allocations. (Robinson-Patman Act Compl. ¶¶ 24-35, 74-89, 116-26.) According to the Robinson-Patman Act Plaintiffs, these combined actions violate the commercial bribery prohibitions of Section 2(c) of the Robinson-Patman Act, 15 U.S.C. § 13(c).

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[3] The "Institutional Defendants" in the Robinson-Patman Act Complaint are Fidelity Distributors Corporation, Fidelity Brokerage Services LLC, Fidelity Investments Institutional Services Co., Janus Capital Corporation, Comerica, Inc., Van Wagoner Capital Management, Inc., and Van Wagoner Funds, Inc.

[4] A "flipper" is defined in the Robinson-Patman Act Complaint as a "customer who sells his allocation of securities within twenty-four to forty-eight hours after purchasing them on the effective date of the offering." (Robinson-Patman Act Compl. ¶ 64.)

DISCUSSION

The Underwriter Defendants move to dismiss both the Sherman Act Complaint and Robinson-Patman Act Complaint on the grounds that: (1) the conduct alleged is immune from attack under federal and state antitrust laws; (2) plaintiffs lack antitrust standing; (3) plaintiffs' conclusory allegations of conspiracy are insufficient to state a valid claim; (4) plaintiffs fail to allege a relevant market; and (5) plaintiffs' state law claims are fatally defective. This Court's inquiry begins and ends with the doctrine of implied immunity.

I. Standards For A Motion To Dismiss

On a motion to dismiss, a court must accept the material facts alleged in the complaint as true and construe all reasonable inferences in a plaintiff's favor.[5] *Official Comm. of Unsecured Creditors of Color Tile, Inc. v. Coopers & Lybrand, LLP*, 322 F.3d 147, 158 (2d Cir. 2003). A court should not dismiss a complaint for failure to state a claim unless "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957);

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[5] Further, "in deciding a Rule 12(b)(6) motion, the Court may consider the following materials: (1) facts alleged in the complaint and documents attached to it or incorporated in it by reference, (2) documents 'integral' to the complaint and relied upon in it, even if not attached or incorporated by reference, (3) documents or information contained in defendant's motion papers if plaintiff has knowledge or possession of the material and relied on it in framing the complaint, (4) public disclosure documents required by law to be, and that have been, filed with the Securities and Exchange Commission, and (5) facts of which judicial notice may properly be taken under Rule 201 of the Federal Rules of Evidence." *In re Merrill Lynch & Co. Research Reports Sec. Litig.*, 273 F. Supp. 2d 351, 356-57 (S.D.N.Y. 2003) (internal citations omitted).

accord Jaghory v. New York State Dep't of Educ., 131 F.3d 326, 329 (2d Cir. 1997).

"This generous approach to pleading applies in the antitrust context." *Hamilton Chapter of Alpha Delta Phi, Inc. v. Hamilton Coll.*, 128 F.3d 59, 63 (2d Cir. 1997). Indeed, "in antitrust cases in particular, the Supreme Court has stated that 'dismissals prior to giving the plaintiff ample opportunity for discovery should be granted very sparingly.'" *George Haug Co. v. Rolls Royce Motor Cars, Inc.*, 148 F.3d 136, 139 (2d Cir. 1998) (quoting *Hosp. Bldg. Co. v. Trs. of Rex Hosp.*, 425 U.S. 738, 746 (1976)). However, a Court must not "assume that the [plaintiff] can prove facts that it has not alleged or that the defendants have violated the antitrust laws in ways that have not been alleged." *Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519, 526 (1983).

"Finally, a complaint can be dismissed for failure to state a claim pursuant to a Rule 12(b)(6) motion raising an affirmative defense 'if the defense appears on the face of the complaint.'" *Color Tile*, 322 F.3d at 158 (quoting *Pani v. Empire Blue Cross Blue Shield*, 152 F.3d 67, 74 (2d Cir. 1998)). Defendants' assertion of implied immunity is an affirmative defense that appears on the face of the complaint, and as such is properly addressed at the motion to dismiss stage. *Miller v. Am. Stock Exch., Inc. (In re Stock Exchs. Options Trading Antitrust Litig.)*, 317 F.3d 134, 150-53 (2d Cir. 2003) ("Stock Exchanges Options") ("Although the doctrine of implied repeal is sometimes described in terms of the district court's 'antitrust jurisdiction,' we think it is more properly viewed as conferring an immunity that is an affirmative defense.") (internal citation omitted).

II. The Doctrine Of Implied Immunity

The doctrine of implied immunity is grounded in the shibboleth that Congress does not intentionally vitiate its own regulatory mandates, and therefore "antitrust laws do

not come into play when they would prohibit an action that a regulatory scheme permits." *Finnegan v. Campenau Corp.*, 915 F.2d 824, 827 (2d Cir. 1990). At the intersection of securities regulation and antitrust law, the doctrine of implied immunity provides that federal securities laws impliedly repeal the Sherman Act with respect to certain conduct, and confer immunity from liability under the antitrust laws for that conduct. The doctrine, and the analytical framework to determine whether it applies in a particular situation, springs from a trilogy of Supreme Court opinions. *See United States v. Nat'l Ass'n of Sec. Dealers, Inc.*, 422 U.S. 694 (1975) ("NASD"); *Gordon v. New York Stock Exch., Inc.*, 422 U.S. 659 (1975); *Silver v. New York Stock Exch.*, 373 U.S. 341 (1963).

Silver, the earliest of the cases, involved an antitrust challenge to a New York Stock Exchange ("NYSE") order enforcing an internal rule prohibiting direct communications with non-member firms. *Silver*, 373 U.S. at 343-44. The Supreme Court held that the Securities Exchange Act of 1934, 15 U.S.C. 78a, *et seq.* (the "*Exchange Act*"), did not impliedly repeal the antitrust laws with respect to this NYSE order because the Securities and Exchange Commission (the "SEC" or the "Commission") lacked jurisdiction "to review particular instances of enforcement of exchange rules." 373 U.S. at 364-67. The Court determined that, given the SEC's lack of authority over internal NYSE rules, there was no potential for conflict between the SEC's regulatory power and the antitrust laws, *Silver*, 373 U.S. at 358, and that "there was a need for applicability of the antitrust laws, for if those laws were deemed inapplicable the challenged conduct would be unreviewable," *Stock Exchanges Options*, 317 F.3d at 145 (discussing *Silver*, 373 U.S. at 358-59). The Court noted, however, that "should review of exchange self-regulation be provided through a vehicle other than the antitrust laws, a different case as to antitrust exemption would be presented." *Silver*, 373 U.S. at 360.

Recently, the Second Circuit noted that *Gordon*, decided more than a decade after *Silver*, was such a "different case." *Stock Exchanges Options*, 317 F.3d at 145. *Gordon* examined the practice of securities exchanges and their members employing fixed commission rates. 422 U.S. at 660-61. The Supreme Court held that implied immunity was warranted because the SEC had expansive regulatory authority over commission rate practices, which it had exercised actively. *Gordon*, 422 U.S. at 690 ("Although SEC action in the early years appears to have been minimal, it is clear that since 1959 the SEC has been engaged in deep and serious study of the commission rate practices of the exchanges and of their members . . . ."). The Court reasoned that even though the fixing of commission rates was prohibited by both the securities laws and antitrust laws at the time the case was heard, the SEC had the statutory authority to permit such conduct in the future should it choose to do so. *Gordon*, 422 U.S. at 690-91. Thus, "if antitrust courts were to impose different standards or requirements, the exchanges might find themselves unable to proceed without violation of the mandate of the courts or of the SEC." *Gordon*, 422 U.S. at 689.

The regulatory conflict in *Gordon* was more than theoretical because of the distinct mandates of the securities and antitrust laws. "Such different standards are likely to result because the sole aim of antitrust legislation is to protect competition whereas the SEC must consider, in addition, the economic health of the investors, the exchanges, and the securities industry." *Gordon*, 422 U.S. at 689. The Court concluded that, as a result, the "interposition of the antitrust laws, which would bar fixed commission rates as per se violations of the Sherman Act, in the face of positive SEC action, would preclude and prevent the operation of the Exchange Act as intended by Congress and as effectuated through SEC regulatory activity." *Gordon*, 422 U.S. at 691. Thus, "failure to imply repeal would render nugatory the

legislative provision for regulatory agency supervision of exchange commission rates." *Gordon*, 422 U.S. at 691.

In *NASD*, decided the same day as *Gordon*, the Court determined that Congress' grant of regulatory authority to the SEC was "sufficiently pervasive" to confer on the defendants immunity from antitrust liability for activities restricting the transferability of mutual fund shares in the secondary market. *NASD*, 422 U.S. at 732. Although the Court found that the NASD's agreement to restrict the sale of mutual fund shares and fix their prices in the secondary market was not explicitly authorized under Section 22(f) of the Investment Company Act of 1940 (the "1940 Act"), 15 U.S.C. § 80a-22(f), Section 22(f) did authorize funds to impose transferability or negotiability restrictions subject to SEC disapproval. *NASD*, 422 U.S. at 729-30. Further, the Court held that the combination of the Maloney Act, 15 U.S.C. § 78o-3, and the 1940 Act conferred upon the SEC "broad regulatory authority . . . to monitor the activities [at issue], and the history of [SEC] regulations suggests no laxity in the exercise of this authority. To the extent that any of [defendants'] ancillary activities frustrate the SEC's regulatory objectives it has ample authority to eliminate them." *NASD*, 422 U.S. at 734. Thus, the "pervasive regulatory scheme" created by the 1940 Act and the Maloney Act, which permitted transferability restrictions unless prohibited by the SEC, necessitated a finding of implied immunity. *NASD*, 422 U.S. at 732. Again, the Court held that immunity was required so that the SEC "could carry out [its] responsibility free from the disruption of conflicting judgments that might be voiced by courts exercising jurisdiction under the antitrust laws." *NASD*, 422 U.S. at 734-35.

When read together, *Silver*, *Gordon* and *NASD* yield "two narrowly-defined situations" in which the doctrine of implied immunity will apply: "'first, when an agency, acting pursuant to a specific Congressional directive, actively regulates the

particular conduct challenged [the *Gordon* scenario], . . . and second, when the regulatory scheme is so pervasive that Congress must be assumed to have foresworn the paradigm of competition [the *NASD* scenario].'" *Stock Exchanges Options*, 317 F.3d at 147 (quoting *Northeastern Tel. Co. v. AT&T*, 651 F.2d 76, 82 (2d Cir. 1981)).

While the Supreme Court has identified these two situations in which implied repeal will apply, "it is a cardinal principle of construction that repeals by implication are not favored." *United States v. Borden Co.*, 308 U.S. 188, 198 (1939). Therefore, "only where there is a 'plain repugnancy between the antitrust and regulatory provisions' will repeal be implied." *Gordon*, 422 U.S. at 682 (quotation omitted); *accord Stock Exchanges Options*, 317 F.3d at 148 ("To be sure, antitrust immunity is not to be presumed from the mere existence of overlapping authority; rather the analysis must focus on the 'potential' for 'conflicts between the antitrust laws and a[n authorized] regulatory scheme.'") (emphasis and alteration in original) (quoting *Strobl v. New York Mercantile Exch.*, 768 F.2d 22, 27 (2d Cir. 1985)). Accordingly, "implied immunity analysis requires a fairly fact-specific inquiry into the nature and extent of regulatory action that allegedly conflicts with antitrust law." *Friedman v. Salomon/Smith Barney, Inc.*, 313 F.3d 796, 799 (2d Cir. 2002), *cert. denied*, 124 S. Ct. 152 (U.S. Oct. 6, 2003) (No. 02-1808); *accord Northeastern Tel.*, 651 F.2d at 83 (implied immunity "must be evaluated in terms of the particular regulatory provision involved, its legislative history, and the administrative authority exercised pursuant to it").

Two recent Second Circuit decisions, *Friedman* and *Stock Exchanges Options*, have clarified the implied immunity doctrine in the context of the interrelationship between securities regulation and the antitrust laws.

The Second Circuit in *Friedman* concluded that, while the SEC did not expressly authorize broker-dealer restrictions designed to discourage "flipping" of IPO shares in order to

stabilize prices in the aftermarket, implied immunity from antitrust regulation was proper. 313 F.3d at 803. The court reasoned that "allowing an antitrust lawsuit to proceed would conflict with Congress' implicit determination that the SEC should regulate the alleged anti-competitive conduct." *Friedman*, 313 F.3d at 801.

In reaching its determination, the Second Circuit reviewed the "SEC's regulation of price stabilization in both the distribution and aftermarket phases of public offerings." *Friedman,* 313 F.3d at 801. The *Friedman* court noted that the Exchange Act gave the Commission authority to regulate the restrictive practices alleged by the plaintiffs, and that the Commission had repeatedly acknowledged its awareness of such conduct. 313 F.3d at 802. In addition, the Second Circuit noted that the Commission had exercised its authority over the conduct even though it had never prohibited it, because the Exchange Act "allows price stabilization practices that the SEC does not prohibit." *Friedman,* 313 F.3d at 802.

Discussing the conflict requirement inherent in consideration of implied immunity, the *Friedman* court held that:

> implied immunity exists where allowing parallel proceedings on antitrust and SEC tracks would subject defendants to conflicting mandates. The source of the conflict may, but need not, involve affirmative SEC action. Conflict also can exist where the SEC has jurisdiction over the challenged activity and deliberately has chosen not to regulate it.

313 F.3d at 801. Thus, the Second Circuit clarified that the "plain repugnancy" required to trigger implied immunity need not be a firefight between the antitrust laws and securities regulation, but rather "extends to potential as well as actual conflicts." *Friedman,* 313 F.3d at 799.

In the wake of *Friedman*, the Second Circuit in *Stock Exchanges Options* upheld antitrust immunity for the practice of restricting equity options trading to a single exchange. *Stock Exchanges Options*, 317 F.3d at 153. Although the conduct alleged was prohibited by both the antitrust laws and securities laws at the time the case was decided, the Second Circuit held the conduct impliedly immune on the grounds that "the SEC has ample statutory authority, which it has repeatedly exercised, to regulate the listing and trading of equity options," and the specific conduct at issue fell within that broader authority. *Stock Exchanges Options*, 317 F.3d at 150. As a result, "the antitrust laws conflict with an overall regulatory scheme that empowers the agency to allow conduct that the antitrust laws would prohibit." *Stock Exchanges Options*, 317 F.3d at 149.

The *Stock Exchanges Options* court began by examining the history of the SEC's regulation of equity options trading, noting that the SEC has vacillated between allowing and prohibiting multiple option listing numerous times since the trading of options on national exchanges began in 1973. *Stock Exchanges Options*, 317 F.3d at 139-142. The Commission's oscillating approach to multiple option listing assisted the *Stock Exchanges Options* court in characterizing the broad scope of the SEC's authority:

> The SEC has ample authority, which it has repeatedly exercised, to regulate the listing and trading of equity options. It has at times encouraged multiple listing and at times disapproved of that practice. . . . Although the SEC's present stance is that agreements for exclusive listing are forbidden, the Commission has the power to alter that position if it concludes that other concerns within its domain outweigh the need to protect competition. We see no way to reconcile that SEC authority, which may be exercised to permit agreements for exclusive listing of equity options, with the antitrust laws.

317 F.3d at 150.

Like the Sherman Act Plaintiffs, the plaintiffs in *Stock Exchanges Options* argued that the conduct at issue should not be immune from antitrust scrutiny because it was expressly prohibited by both SEC regulations and the antitrust laws at the time the action was filed. 317 F.3d at 144. The Second Circuit disagreed, holding that the broad scope of the SEC's authority over the listing and trading of equity options, rather than the fortuity of timing, was the touchstone for implied immunity:

> Although plaintiffs contend that an implied repeal is not needed to avoid conflicts here because exclusivity agreements are now prohibited by both the antitrust laws and the SEC, that contention misperceives the proper analytical focus. The appropriateness of an implied repeal does not turn on whether the antitrust laws conflict with the current view of the regulatory agency; rather it turns on whether the antitrust laws conflict with an overall regulatory scheme that empowers the agency to allow conduct that the antitrust laws would prohibit.

Stock Exchanges Options, 317 F.3d at 149. Thus, the Second Circuit in *Stock Exchanges Options* held the antitrust laws impliedly repealed based not on the existence of a current conflict between the particular SEC regulations and antitrust laws, but rather on the potential that future SEC regulation could conflict with the antitrust laws and expose defendants to inconsistent mandates. Citing *Gordon* and *NASD*, the *Stock Exchanges Options* court reasoned that:

> "Permitting courts throughout the country to conduct their own antitrust proceedings would conflict with the regulatory scheme authorized by Congress," and that the "implied repeal of the antitrust laws is, in fact, necessary to" avoid "rendering nugatory the legislative provision for regulatory agency supervision." Thus, the proper focus is not on the Commission's current regulatory position but rather on the Commission's authority to permit conduct that the antitrust laws would prohibit.

Stock Exchanges Options, 317 F.3d at 149 (emphasis in original) (internal quotations omitted).

Friedman and *Stock Exchanges Options* have focused the inquiry concerning implied immunity by counseling that the power to regulate is tantamount to regulation. Thus, the *Gordon* threshold that antitrust laws and securities regulation be "plainly repugnant" is satisfied by potential, as well as actual, conflicts. *See Stock Exchanges Options*, 317 F.3d at 149; *Friedman*, 313 F.3d at 801.

III. Amicus Curiae Submissions

This Court invited, and received, amicus curiae briefs from the SEC and the Department of Justice, Antitrust Division (the "DOJ"), addressed to the issue of implied immunity. The SEC argues that implied immunity is required in this case, noting its past and continuing regulation of the IPO process, the syndicate system and various nominally anticompetitive price stabilization techniques. (Memorandum Amicus Curiae of the SEC ("SEC Amicus Br."), at 39-40.) The DOJ, in contrast, argues that implied immunity is improper in this case, and that antritrust scrutiny of the alleged conduct is necessary. (Memorandum of the United States as Amicus Curiae ("DOJ Amicus Br.") at 23.) In addition, this Court received an amicus curiae submission from the Office of the Attorney General of the State of New York, Antitrust Division (the "NYAG"), which largely echoes the position of the DOJ. (NYAG's letter submission as amicus curiae ("NYAG Amicus Br."), at 14.)

IV. Implied Immunity With Respect To The Sherman Act Plaintiffs

In its amicus brief, the SEC asserts that "the IPO allocation and commission practices challenged [by the Sherman Act Plaintiffs] fall within the very heart of the Commission's regulatory authority over underwriting syndicates under both the Securities Act of 1933, 15 U.S.C. 77a, *et seq.* [the "Securities Act"], and the [Exchange Act],

and they are comprehensively regulated." (SEC Amicus Br. at 1.) While this Court agrees with the SEC's contention that its regulatory authority over the conduct alleged in the Sherman Act Complaint is pervasive, it need not reach the question of whether there should be implied immunity under the *NASD* scenario. The reason is that the conduct alleged by the Sherman Act Plaintiffs is immune from antitrust scrutiny under a *Gordon* analysis, as informed by *Friedman* and *Stock Exchanges Options*. In the first instance, the SEC explicitly permits much of the conduct alleged in the Sherman Act Complaint. More importantly, the SEC, through application of its broad regulatory authority over the spectrum of conduct related to securities offerings, is empowered to regulate the conduct alleged by the Sherman Act Plaintiffs. It is this sweeping power to regulate that spawns the potential conflict with the antitrust laws that, under *Friedman* and *Stock Exchanges Options*, requires a finding of implied immunity.

A. Underwriter Conduct Permitted By The Securities Regulatory Regime

When the inflammatory characterizations are centrifuged from the Sherman Act Complaint, much of the conduct alleged is authorized under the current securities regulatory regime. For example, the Sherman Act Plaintiffs assert that the Underwriter Defendants engaged in a number of joint activities, including that: (1) the Underwriter Defendants "still regularly combined with one another during the Class Period into underwriting syndicates" (Sherman Act Compl. ¶ 38); (2) the Underwriter Defendants engaged in a secret "centralizing agreement" that the lead underwriter "could itself distribute all the shares of each Class Security" (Sherman Act Compl. ¶ 39); and (3) syndicate members who did not sell all of their allotment "nevertheless shared in the underwriters' discount" (Sherman Act Compl. ¶ 39). Those allegations, however, are nothing more than a theater-wide attack on the syndicate system, the predominant structure for the public distribution of equities since the infancy of the

securities markets. *See United States v. Morgan*, 118 F. Supp. 621, 635 (S.D.N.Y. 1953) ("The syndicate system as a means of issuing and distributing security issues was in use at least as early as the 1890's.").[6]

While the SEC's regulation of the syndicate system is generally accomplished through its direct regulation of the NASD and other self-regulatory organizations ("SROs"), the Commission itself expressly recognizes the validity of the syndicate system. *See, e.g.*, Exchange Act Release No. 17371, 21 S.E.C. Dkt. 930 (Dec. 12, 1980) (the "Papilsky Release") (providing an overview of the syndicate system and describing the "broad discretionary authority" typically granted to the managing underwriter by the "agreement among underwriters . . . that establishes the obligations of each [syndicate] member"). However, it is the SEC's pervasive regulatory oversight over the NASD, "the only national securities association' registered with the SEC pursuant to 15 U.S.C. § 78o-3," *Domestic Sec., Inc. v. SEC*, 333 F.3d 239, 242 (D.C. Cir. 2003), and other SROs, that is

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[6] For a detailed history of the syndicate system in the United States, this Court refers to then-District Judge Harold Medina's learned opinion in *Morgan*, 118 F. Supp. at 635-55. Briefly, a company desiring to sell stock to the public (an "issuer") hires an investment bank (the "managing underwriter") to effect the public distribution of shares at a fixed price agreed upon by the issuer and the managing underwriter (the "offering price"). In almost all instances, the offering price is set below the estimated market value of the stock to ensure its attractiveness to purchasers. The managing underwriter organizes an underwriting syndicate, which is a consortium of investment banks responsible for distributing shares to the public. The syndicate members make a concurrent public offering of the issuer's shares at the offering price, with uniform concessions at each level of the distribution. *See generally* 1 Louis Loss & Joel Seligman, Securities Regulation 328-34 (3d ed. 2003).

the cornerstone of the SEC's authority over the syndicate system. *See NASD*, 422 U.S. at 732 (SEC has "pervasive" authority over the NASD).

As a registered national securities association under the 15 U.S.C. § 78o-3, the NASD comprehensively and actively regulates syndicates—including their formation, communications among syndicate members, commission structure, allocation of securities and fee arrangements—pursuant to rules that are formally reviewed by the SEC and subject to its approval. *See* 15 U.S.C. § 78s(b) (requiring that all rules promulgated by SROs be approved by the SEC, and setting out procedures for review thereof); *accord Domestic Sec.*, 333 F.3d at 241 ("Under the [Exchange Act], the [SEC] must approve any changes to the rules of the [NASD]."). For example, NASD Rule 2110 and interpretation IM-2110-5, which prohibit certain forms of price coordination and intimidation as "inconsistent with just and equitable principles of trade," explicitly disclaim any limitation, constraint or other restriction on the "freedom" of broker-dealers to "engage in any underwriting (or any syndicate for the underwriting) of securities to the extent permitted by the federal securities laws." NASD Manual, IM-2110-5: Anti-Intimidation/Coordination; *see also* NASD Manual, Rule 2110: Standards of Commercial Honor and Principles of Trade.

Further, NASD Rule 2110 and interpretation IM-2110-1 combine to require all participants in an offering syndicate to make bona fide public distributions, and prohibit them from either withholding securities for their own benefit or using an allocation of securities to reward persons for future business. NASD Manual, Rule 2110; NASD Manual, IM-2110-1: Free-Riding and Withholding. However, that same combination of NASD Rule 2110 and interpretation IM-2110-1 explicitly permits syndicate participants to engage in communications "for the purpose of exploring the possibility of a purchase or sale of that security, and to negotiate for or

agree to such purchase or sale." NASD Manual, IM-2110-1. A number of other NASD rules and interpretations regulate various aspects of the syndicate system, including the actions of its broker-dealer participants.[7]

In addition to a general indictment of the syndicate system, the Sherman Act Plaintiffs brand as conspiratorial joint actions by the Underwriter Defendants during the "road show" process. For example, to support their conspiracy claim, the Sherman Act Plaintiffs allege that defendants: (1) "jointly and individually, hosted 'road shows' during which customers were introduced to the issuer and its managers and during which the offering was described"; (2) "conducted telephone calls, meetings and other regular communications prior to the IPOs of Class Securities;" and (3) "at times jointly, made inquiries of customers or others interested in purchasing Class Securities concerning the number of shares that such person would be willing to purchase in the aftermarket and the prices such person would be willing to pay for such shares." (Sherman Act Compl. ¶ 54.) Each of

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[7] *See, e.g.*, NASD Manual, Rule 2330: Customers' Securities or Funds (prohibiting NASD member firms from profitsharing in customer accounts); NASD Manual, Rule 2710: Corporate Financing Rule—Underwriting Terms and Arrangements (governing public offering filing requirements, review process, and underwriter compensation); NASD Manual, Rule 2740: Selling Concessions, Discounts and Other Allowances (restrictions on selling concessions, discounts, or other allowances by members in connection with the sale of securities which are part of a fixed price offering); NASD Manual, Rule 2770: Disclosure of Price in Selling Agreements (mandating disclosure of public selling price, and any concessions thereto, in "selling syndicate agreements"); NASD Manual, Rule 4624: Penalty Bids and Syndicate Covering Transactions (requiring written notice of intention to impose penalty bids or conduct syndicate covering transactions by the syndicate manager).

these actions, however, are expressly permitted during the "road show" period.

While Section 5 of the Securities Act, 15 U.S.C. § 77e, imposes restrictions on non-exempt offerings of securities—including prohibitions on offers before a registration statement is filed, as well as limitations on oral and written communications with potential buyers after the registration statement is filed but before it becomes effective—Section 2(a)(3) excludes from those offering restrictions certain communications, including "preliminary negotiations or agreements between an issuer . . . and any underwriter or among underwriters who are or are to be in privity of contract with an issuer." 15 U.S.C. § 77b(a)(3). In addition, Securities Act Rule 134 permits broker-dealers to collect from potential buyers "indications of interest" in an IPO prior to its issuance. 17 C.F.R. § 230.134(d) (permitting broker-dealers to "solicit from the recipient of the communication an offer to buy the security or request the recipient to indicate . . . whether he might be interested in the security").[8]

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[8] *See* also 17 C.F.R. § 242.101(b)(9) (exempting "offers to sell or the solicitation of offers to buy the securities being distributed (including securities acquired in stabilizing), or securities offered as principal by the person making such offer or solicitation" from restrictions on distribution participants during restricted period); 17 C.F.R. § 242.102(b)(5) (exempting "offers to sell or the solicitation of offers to buy the securities being distributed" from restrictions on activities by issuers and selling security holders during distribution); *Private Financial Network*, SEC No-Action Letter, Fed. Sec. L. Rep. (CCH) ¶ 77,332 (Mar. 12, 1997) (stating that electronic roadshow presentations transmitted over the internet to potential investors do not constitute a "prospectus" under the 15 U.S.C. § 77b(a)(10)); Institutional Investor Study of the SEC, H.R. Doc. No. 92-64, Pt. 5, at 2337 (1971) ("The expected level [of price] is influenced by the indications of interest [the underwriters] receive in response to their dissemination of the preliminary (cont'd)

Apart from their indiscriminate assault on the syndicate system and various "road show" practices, the Sherman Act Plaintiffs also seek to support their claim of an "unlawful agreement" by alleging that the Underwriter Defendants "frequently communicated with one another as members of the [NASD] where they jointly participated in the trading of securities on . . . NASDAQ, and are members of various national and regional exchanges, including the [NYSE] . . . and the American Stock Exchange ('AMEX')." (Sherman Act Compl. ¶ 47.) However, the Sherman Act Plaintiffs ignore the fact that the SEC not only permits such conduct, it requires that broker-dealers be members of, or employ, one of these SROs.[9] In addition, the Sherman Act Plaintiffs allege

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prospectuses and oral inquiries."); *Offers and Sales of Securities by Underwriters and Dealers*, Securities Act Release No. 4697, 1964 WL 68261, at *2 (May 28, 1964) (during the period after the filing and before the effective date of the registration statement, a broker-dealer "can orally solicit indications of interest or offers to buy and may discuss the securities with his customers and advise them whether or not in his opinion the securities are desirable or suitable for them"); *Publication of Information Prior to or After the Effective Date of a Registration Statement*, Securities Act Release No. 3844, 1957 WL 3605, at *2 (Oct. 8, 1957) (publication of information prior to or after effective date of registration statement, including restrictions on communications during waiting period); cf. 17 C.F.R. §§ 230.137 to 139 (permitting certain communications through issuance of research reports); 17 C.F.R. § 230.460 (in context of requests for acceleration of the effective date of a registration statement, recognizing the role of underwriters in disseminating information about the offering and the issuer).

[9] *See* 15 U.S.C. § 78o(b)(8) ("It shall be unlawful for any registered broker or dealer to effect any transaction in . . . any security . . . unless such broker or dealer is a member of a

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that the Underwriter Defendants communicated and worked together as market makers (Sherman Act Compl. ¶ 45), conduct that is also expressly permitted under the current securities regulatory regime.[10]

As each of the aforementioned activities alleged in the Sherman Act Complaint are expressly permitted under the current securities regulatory regime,[11] a determination by a

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(... cont'd)

securities association registered pursuant to section 78o-3 of this title or effects transactions in securities solely on a national securities exchange of which it is a member."); *see also* 15 U.S.C. § 78c(a)(26) ("The term 'self-regulatory organization' means any national securities exchange, registered securities association, or registered clearing agency."); 15 U.S.C. § 78f (governing registration and operation of national securities exchanges); *cf. Barbara v. New York Stock Exch.*, 99 F.3d 49, 51 (2d Cir. 1996) ("The [NYSE] is a nonprofit New York corporation registered with the [SEC] as a national securities exchange pursuant to . . . 15 U.S.C. § 78f . . . [and] a 'self-regulatory organization' [under] 15 U.S.C. § 78c(a)(26)."); *Feins v. AMEX*, 81 F.3d 1215, 1218 (2d Cir. 1996) ("AMEX is registered as a national securities exchange pursuant to . . . 15 U.S.C. § 78f, and is a 'self-regulatory organization' as defined by . . . 15 U.S.C. § 78c(a)(26).").

[10] *See* NASD Manual, Rules 4600 to 4652: NASDAQ Market Maker Requirements, esp. Rule 4611: Registration As A Nasdaq Market Maker (noting that "quotations and quotation sizes may be entered into The Nasdaq Stock Market only by an Association member registered as a Nasdaq market maker") (emphasis added); 17 C.F.R. § 242.103 ("This section permits broker-dealers to engage in market making transactions in covered securities that are Nasdaq securities without violating the provisions of § 242.101.").

[11] Other actions alleged in the Sherman Act Complaint, while not expressly permitted, are not prohibited by any SEC or SRO regulation. These include allegations that the Underwriter Defendants: (1) collaborated with one another in trade associations

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court that any of them constituted an antitrust violation would bring the antitrust laws into direct conflict with the securities laws. This species of "plain repugnancy between the antitrust and regulatory provisions" would, in the absence of a finding of implied immunity, "render nugatory the legislative provision for regulatory agency supervision." *Gordon,* 422 U.S. at 682, 691.

B. The SEC's Power To Regulate The Conduct Alleged In The Sherman Act Complaint

Although much of the conduct alleged in the Sherman Act Complaint is expressly permitted under the current securities regulatory regime, *see supra* Section IV.A, certain alleged conduct could be deemed prohibited under both the securities laws and the antitrust laws. For example, the Sherman Act Plaintiffs allege impermissible "tie-in" and "laddering" arrangements (Sherman Act Compl. ¶¶ 4(b), 7), as well as "commissions on the purchase and sale of other securities, purchases of an issuer's shares in the follow-up or 'secondary' public offerings (for which the underwriters would earn underwriting discounts), [and] commitments to

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such as the Securities Industry Association (Sherman Act Compl. ¶ 46); (2) held meetings among top investment bankers, legal officers, and marketing managers (Sherman Act Compl. ¶ 48); (3) disclosed to each other the identities of the customers to whom they allocated, or intended to allocate, offered securities (Sherman Act Compl. ¶ 56); and (4) maintained systems that promptly informed defendants of commissions, charges, and other payments that their customers were making and the customers' commissions-to-equity ratios and turnover ratios (Sherman Act Compl. ¶ 62). In its amicus submission, the SEC represents that "none" of the aforementioned activities "are improper under the governing regulations." (SEC Amicus Br. at 35-36.)

purchase other, less attractive securities, or the laddered purchases." (Sherman Act Compl. ¶ 6.) While this conduct, under certain circumstances, could be deemed violative of the securities laws, such a finding would not be fatal to a conferral of implied immunity. This is because the SEC has broad power to regulate the conduct at issue in this case, and therefore potential conflicts exist even between activities that are, at the current time, prohibited under both the securities and antitrust regulatory regimes. Under the Supreme Court trilogy of *Silver*, *Gordon* and *NASD*, as interpreted by the Second Circuit in *Friedman* and *Stock Exchanges Options*, such potential conflicts require a finding of implied immunity. *See Stock Exchanges Options*, 317 F.3d at 149 ("The proper focus is not on the Commission's current regulatory position but rather on the Commission's authority to permit conduct that the antitrust laws would prohibit."); *Friedman*, 313 F.3d at 799 ("The 'plain repugnancy', or conflict, between antitrust and securities laws extends to potential as well as actual conflicts.").

The broad general authority to regulate IPO allocation and underwriter commission practices is granted to the SEC by: (1) the Securities Act, under which the Commission regulates the offering process; (2) the Exchange Act, under which the Commission defines and regulates manipulative acts in connection with the purchase or sale of securities; and (3) its reservoir of rulemaking authority over SROs. Indeed, according to the SEC, these practices "fall within the very heart of the Commission's regulatory authority over underwriting syndicates." (SEC Amicus Br. at 1.)

1. The Broad Scope Of The SEC's Authority Sets The SEC Apart From Other Federal Regulatory Agencies

The SEC's power to regulate all aspects of the national securities markets is integral to the system of capital formation in the United States. The architecture of the securities regulatory regime, and Congress' sweeping grant

of rulemaking and enforcement authority to the SEC, differentiates the Commission from other federal regulatory agencies.[12] Therefore, the Sherman Act Plaintiffs' reliance on *Strobl v. New York Mercantile Exch.*, 768 F.2d 22 (2d Cir. 1985), and similar cases is misplaced.

In *Strobl*, the Second Circuit found that implied immunity was not warranted where the alleged manipulative conduct violated both the *Commodities Exchange Act* (the "CEA") and the Sherman Act. 768 F.2d at 31. *Strobl*, however, presents a very different case than the current action in that "price manipulation is an evil that is always forbidden under every circumstance by both the [CEA] and the antitrust laws . . . [and] therefore, application of the latter cannot be said to be repugnant to the purposes of the former." 768 F.2d at 28. As such, no potential conflict could arise between the antitrust laws and the CEA since both have competition as their sole statutory goal.

In contrast, the securities laws take into consideration more than just free competition, and in fact permit price manipulation in certain instances despite its effect on competition. *See* S. Rep. No. 94-75, at 13 (1975), reprinted in 1975 U.S.C.C.A.N. 179, 191 (noting that Commission's

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[12] *See, e.g.*, H.R. Rep. No. 73-1383, at 6-7 (1934) ("In a field where practices vary and where practices legitimate for some purposes may be turned to illegitimate and fraudulent means, broad discretionary powers in the [SEC] have been found practically essential."); S. Rep. No. 73-792, at 5 (1934) ("From the outset, the Committee has proceeded on the theory that so delicate a mechanism as the modern stock market cannot be regulated efficiently under a rigid statutory program. Unless considerable latitude is allowed for the exercise of administrative discretion, it is impossible to avoid, on the one hand, unworkable 'strait-jacket' regulation and, on the other, loopholes which may be penetrated by slight variations in the method of doing business.").

"explicit obligation to balance . . . the competitive implications of self-regulatory and Commission action should not be viewed as requiring the Commission to justify that such actions be the least anti-competitive manner of achieving a regulatory objective. Rather, the Commission's obligation is to weigh competitive impact in reaching regulatory conclusions.") (emphasis added); *Finnegan*, 915 F.3d at 825-26 ("It is recognized that competition is the touchstone of the antitrust laws, while in the regulated securities industry the emphasis is on requiring full disclosure without otherwise changing the balance in the market for corporate control. Tension and at times conflict exist between these established public policies."); *see also* 15 U.S.C. § 78o-3(b)(9) (national securities association may not impose "any burden on competition not necessary or appropriate in furtherance of the purposes" of the Act). The breadth of the SEC's authority, in conjunction with its unique mandate to balance competition with other market concerns, increases the likelihood of conflict with antitrust laws, and thus weighs heavily in favor of granting implied immunity where the securities regulatory regime, rather than a relatively narrow statute such as the CEA, is implicated.[13]

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[13] The same analysis undermines the Sherman Act Plaintiffs' reliance on *Law Offices of Curtis Trinko, LLP v. Bell Atlantic Corp.*, 305 F.3d 89, 109 (2d Cir. 2002) (rejecting implied immunity under the 1996 Telecommunications Act where the Act was intended to "throw[] all aspects of the industry open to competition and thus antitrust analysis" and contained a "specific savings clause, which specifies that 'nothing in this Act or the amendments made by this Act . . . shall be construed to modify, impair, or supersede the applicability of any of the antitrust laws.'") (internal quotations omitted), *cert. granted in part*, 538 U.S. 905 (2003) (No. 02-682).

2. The SEC's Power To Regulate Under The Securities Act

The Securities Act provides the SEC with plenary authority to regulate the initial public offering of securities. First, the SEC has power to regulate all aspects of the syndicate system. *See supra* Section IV.A. This includes the power to require the registration of securities, determine the effectiveness of such registration statements, and punish violations.[14] Further, the Securities Act gives the Commission the power to regulate communications among underwriting participants and their customers prior to distribution, including roadshows, the dissemination of prospectuses, the process of book-building and solicitations of "indications of interest."[15] Finally, Section 28 of the

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[14] *See* 15 U.S.C. § 77e (prohibitions relating to interstate commerce and the mails); 15 U.S.C. § 77f (registration of securities); 15 U.S.C. § 77g (information required in registration statement); 15 U.S.C. § 77h (taking effect of registration statements and amendments thereto); 15 U.S.C. § 77k (civil liabilities on account of false registration statement); 15 U.S.C. § 77aa (schedule of information to be included in a registration statement, including "(16) the price at which it is proposed that the security shall be offered to the public . . . and any variation therefrom . . . [and] (17) all commissions or discounts paid or to be paid, directly or indirectly, by the issuer to the underwriters in respect of the sale of the security to be offered.").

[15] *See supra* Section IV.A; *see also* 15 U.S.C. § 77b(a)(3) (excluding from offering restrictions communications including "preliminary negotiations or agreements between an issuer . . . and any underwriter or among underwriters who are or are to be in privity of contract with an issuer"); 15 U.S.C. § 77j (information required in a prospectus); 15 U.S.C. § 77l (civil liabilities arising in connection with prospectuses and communications); 15 U.S.C. § 77z-2 (application of safe harbor for forward-looking statements); 17 C.F.R. § 230.134(d) (permitting broker-dealers to (cont'd)

Securities Act permits the SEC "to exempt [by rule or regulation] any person, security, or transaction, or any class or classes of persons, securities or transactions, from any provision or provisions of [the Securities Act.]." 15 U.S.C. § 77*z*-3; *see* also 15 U.S.C. § 77r (conferring authority on the Commission to "make, amend, and rescind such rules and regulations as may be necessary to carry out the provisions" of the Securities Act).

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"solicit from the recipient of the communication an offer to buy the security or request the recipient to indicate . . . whether he might be interested in the security"); Offers and Sales of Securities by Underwriters and Dealers, Securities Act Release No. 4697, 1964 WL 68261, at *2 (May 28, 1964) (during the period after the filing and before the effective date of the registration statement, a broker-dealer "can orally solicit indications of interest or offers to buy and may discuss the securities with his customers and advise them whether or not in his opinion the securities are desirable or suitable for them"); Publication of Information Prior to or After the Effective Date of a Registration Statement, Securities Act Release No. 3844, 1957 WL 3605, at *2 (Oct. 8, 1957) (publication of information prior to or after effective date of registration statement, including restrictions on communications during waiting period); *see also* 17 C.F.R. § 230.144 (Securities Act Rule 144) governing persons deemed not to be engaged in a distribution and therefore not underwriters); 17 C.F.R. § 230.144A (Securities Act Rule 144A governing private resales of securities to institutions); 17 C.F.R. § 230.176 (Securities Act Rule 176 governing circumstances affecting the determination of what constitutes reasonable investigation and reasonable grounds for belief under § 11 of the Securities Act); 17 C.F.R. § 230.415 (Securities Act Rule 415 governing delayed or continuous offering and sale of securities); 17 C.F.R. § 230.430A (Securities Act Rule 430A governing the prospectus in a registration statement at the time of effectiveness).

3. The SEC's Power To Regulate Under The Exchange Act

The Exchange Act grants the Commission sweeping authority to define and prohibit manipulative practices in connection with securities offerings.[16] *See Friedman*, 313 F.3d at 802 (the Exchange Act "allows price stabilization practices that the SEC does not prohibit"). For example, Section 9(a) of the Exchange Act outlaws certain forms of manipulative conduct involving exchange-listed securities in the aftermarket, and empowers the Commission to determine whether potentially abusive practices involving those securities should be prohibited, permitted or regulated, including whether certain acts of aftermarket stabilization are permissible:

> It shall be unlawful for any person, directly or indirectly . . . (6) To effect . . . any series of transactions . . . for the purpose of pegging, fixing or stabilizing the price of such security in contravention of such rules and regulations as the Commission may prescribe as necessary and appropriate in the public interest or for the protection of investors.

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[16] *See, e.g.*, Anti-Manipulation Rules Concerning Securities Offerings, Exchange Act Release No. 7375, 62 Fed. Reg. 520 (Jan. 3, 1997) ("Congress granted the Commission broad rulemaking authority to combat manipulative abuses in whatever form they might take."); Review of Antimanipulation Reg. Of Sec. Offerings, 56 S.E.C. Dkt. 1302 (Apr. 19, 1994) ("Because Congress recognized that market manipulations can assume many forms, it did not define the term in the Exchange Act or elsewhere," but instead provided to the Commission "authority to define manipulative practices and adopt rules to proscribe and prevent such conduct.").

15 U.S.C. § 78i(a) (emphasis added); *see also* 17 C.F.R. § 242.104 (establishing guidelines for stabilization). Whether actions such as the "laddering" or "tie-in" arrangements alleged by the Sherman Act Plaintiffs are permissible aftermarket stabilization practices is not for this Court to determine. It is enough that the Commission is granted the authority to make that determination. *See Stock Exchanges Options*, 317 F.3d at 149 ("The appropriateness of an implied repeal . . . turns on whether the antitrust laws conflict with an overall regulatory scheme that empowers the agency to allow conduct that the antitrust laws would prohibit.").

Similarly, Section 10(b) of the Exchange Act gives the Commission broad rulemaking authority to address "manipulative and deceptive devices," making it unlawful for any person to employ "any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors." 15 U.S.C. § 78j(b) (emphasis added). Section 15(c), dealing with the registration and regulation of broker-dealers like the Underwriter Defendants, prohibits broker-dealers from engaging in any transaction "in connection with which such broker or dealer engages in any fraudulent, deceptive, or manipulative act or practice," 15 U.S.C. § 78o(c)(2)(A), and gives the Commission the power "by rules and regulations [to] define, and prescribe means reasonably designed to prevent, such acts and practices as are fraudulent, deceptive, or manipulative." 15 U.S.C. 78o(c)(2)(D). The Commission's authority extends to manipulative or deceptive conduct undertaken either unilaterally or in conjunction with other broker-dealers,[17] and it has implemented this arsenal of

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[17] *See, e.g.*, 15 U.S.C. § 78i(a)(6) ("To effect either alone or with one or more other persons any series of transactions . . . ."); 17 C.F.R. § 242.101 (prohibiting manipulative activity undertaken by (cont'd)

authority through the adoption of multifarious rules both defining and addressing manipulative and deceptive conduct.[18]

By far the clearest manifestation of the Commission's power to regulate the landscape of allegedly manipulative and deceptive conduct at issue in this case can be found in 17 C.F.R. § 242.100-05, known as "Regulation M." Regulation M was adopted in 1996 to replace Exchange Act Rules 10b-6, 6A, 7, 8 and 21 (the "trading practice rules"). *See* SEC Release No. 33-7375, 62 Fed. Reg. 520 (Jan. 3, 1997). Regulation M, like the trading practice rules that preceded it,

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a distribution participant either alone or with one or more purchasers).

[18] *See, e.g.*, 17 C.F.R. § 240.10b-3 (prohibiting broker-dealers from employing "in connection with the purchase or sale of any security . . . any act, practice, or course of business defined by the Commission to be included within the term 'manipulative, deceptive, or other fraudulent device or contrivance'"); 17 C.F.R. § 240.10b-5 (prohibiting any person from employing manipulative and deceptive devices "in connection with the purchase or sale of any security"); 17 C.F.R. § 240.10b-18 (providing issuers with a safe harbor from liability for manipulation if they repurchase their common stock in the open market in accordance with the rule's manner, time, price, and volume conditions); 17 C.F.R. § 240.15c1-3 (defining broker-dealer misrepresentations concerning registration of securities as "manipulative and deceptive"); 17 C.F.R. § 240.15c1-5 (defining acts by any broker-dealer "controlled by, controlling, or under common control with, the issuer of any security" as "manipulative and deceptive" absent proper disclosure); 17 C.F.R. § 240.15c1-6 (defining participation by broker-dealer's customers in any distribution in which broker-dealer is participating as manipulative or deceptive absent proper disclosure).

is "intended to prevent those having a financial interest in a distribution from either manipulating the price of a security or boosting its trading volume and thereby misleading potential investors as to the 'true' state of the public market for the security being distributed."[19] (SEC Amicus Br. at 11.)

Specifically, Regulation M prohibits distribution participants—including issuers, selling security holders and underwriters—from bidding for or purchasing, or attempting to induce others to bid for or purchase, the securities being distributed during the restricted period. 17 C.F.R. § 242.101. Importantly, Regulation M exempts certain conduct that would otherwise be prohibited, such as "transactions among distribution participants in connection with a distribution, . . . purchases of securities from an issuer or selling security holder in connection with a distribution" and "offers to sell or the solicitation of offers to buy the securities being distributed." 17 C.F.R. § 240.101(b)(8)-(9). In addition, Regulation M governs aftermarket stabilization, prohibiting it except "for the purpose of preventing or retarding a decline in the market price of a security," as well as syndicate covering transactions, the imposition of penalty bids and other related activities.[20] 17 C.F.R. § 242.104; *see also*

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[19] *See also* SEC Release No. 33-7375, 62 Fed. Reg. 520 (Jan. 3, 1997) ("Regulation M is intended to preclude manipulative conduct by persons with an interest in the outcome of an offering."); SEC Division of Market Regulation, Staff Legal Bulletin No. 10: Prohibited Solicitations and "Tie-in" Agreements for Aftermarket Purchases, ¶ 2 (August 25, 2000) ("Bulletin No. 10"), available at http://www.sec.gov/interps/legal/slbmr10.htm ("Regulation M is intended to protect the integrity of the offering process by precluding activities that could artificially influence the market for the offered security.").

[20] A syndicate covering transaction is "the placing of any bid or the effecting of any purchase on behalf of the sole distributor or (cont'd)

Papilsky Release, 1980 WL 22136, at *4 ("In connection with some fixed price offerings, the underwriters may elect to 'stabilize' the market for the offered security during the distribution. . . . Stabilization is intended to facilitate an orderly distribution of securities by preventing or retarding a marked decline in the price of the offered security."); *cf.* 17 C.F.R. § 240.17a-2 (Exchange Act rule setting forth certain record-keeping requirements related to stabilization, syndicate covering transactions and penalty bids).

Included in the Commission's interpretation of prohibited activity under Regulation M are the very tie-in, laddering and other aftermarket agreements alleged by the Sherman Act Plaintiffs. On August 25, 2000, the SEC's Division of Market Regulation released Bulletin No. 10, titled "Prohibited Solicitations and 'Tie-in' Agreements for Aftermarket Purchases," in order to "remind[] underwriters, broker-dealers, and any other person who is participating in a distribution of securities . . . that they are prohibited from soliciting or requiring their customers to make aftermarket purchases until the distribution is completed." Bulletin No. 10, Summary. Specifically, Bulletin No. 10 addresses "complaints that, while participating in a distribution of securities, underwriters and broker-dealers have solicited their customers to make additional purchases of the offered security after trading in the security begins," and that "some

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the underwriting syndicate or group to reduce a short position created in connection with the offering." 17 C.F.R. § 242.100(b). A penalty bid is "an arrangement that permits the managing underwriter to reclaim a selling concession from a syndicate member in connection with an offering when the securities originally sold by the syndicate member are purchased in syndicate covering transactions." 17 C.F.R. § 242.100(b). Both are techniques used to stabilize IPO prices in the aftermarket.

underwriters have required their customers to agree to buy additional shares in the aftermarket as a condition to being allocated shares in the distribution (i.e., 'tie-in' agreements)." Bulletin No. 10 ¶ 1. Reiterating the Commission's consistent view of this conduct, Bulletin No. 10 explained:

> Tie-in agreements are a particularly egregious form of solicited transaction prohibited by Regulation M. As far back as 1961, the Commission addressed reports that certain dealers participating in distributions of new issues had been making allotments to their customers only if such customers agreed to make some comparable purchase in the open market after the issue was initially sold. The Commission said that such agreements may violate the anti-manipulative provisions of the Exchange Act, particularly Rule 10b-6 (which was replaced by Rules 101 and 102 of Regulation M) under the Exchange Act, and may violate other provisions of the federal securities laws.

Bulletin No. 10 ¶ 2 (footnotes omitted).

Finally, in an analogue to its broad exemptive powers under the Securities Act, Section 36 of the Exchange Act grants the SEC general exemptive power pursuant to which "the Commission, by rule, regulation, or order, may conditionally or unconditionally exempt any person, security or transaction, or any class or classes of persons, securities, or transactions, from any provision or provisions of [the Exchange Act] or of any rule or regulation thereunder." 15 U.S.C. § 78mm.

4. The SEC's Pervasive Authority Over SROs

As noted earlier, the SEC is empowered to regulate or oversee the regulation of the spectrum of broker-dealer conduct through its pervasive regulation of the NASD and other SROs. *See supra* Section IV.A; *see also* NASD Manual, Rule 2210: Communications With The Public (setting out standards and filing requirements for members'

communications with the public); NASD Manual, Rule 2711: Research Analysts and Research Reports (rule governing research analyst reports); NASD Manual, Rule 2720: Distribution of Securities of Members and Affiliates — Conflicts of Interest (prohibiting members and associated persons from participating in the distribution of a public offering if there is a conflict of interest with the issuer); NASD Manual, Rule 2750: Transactions With Related Persons (prohibiting the selling or placement of securities by an NASD member engaged in a fixed price offering to certain related persons unless certain conditions are met).

5. The SEC's Power To Regulate Underwriter Compensation And Commission Practices

Finally, the Commission, along with the NASD and other SROs, engages in active regulation of underwriter compensation and commission practices. *Gordon,* 422 U.S. at 659 (holding that systems of fixed commission rates, which are under the active supervision of the SEC, are immune from antitrust laws). Apart from its authority over SROs, the Commission itself directly regulates underwriter commissions and compensation. For example, Section 6(e)(1) of the Exchange Act authorizes the Commission to permit a "national securities exchange to impose a reasonable schedule or fix reasonable rates of commissions, allowances, discounts or other fees to be charged by its members for effecting transactions on such exchange." 15 U.S.C. § 78f.[21]

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[21] *See also* 15 U.S.C. § 78o-3(b) ("An association of brokers and dealers shall not be registered as a national securities association unless the Commission determines that . . . (6) the rules of the association . . . are not designed to permit unfair discrimination between customers, issuers, brokers, or dealers, to fix minimum profits, to impose any schedule or fix rates of commissions, allowances, discounts, or other fees to be charged by its members.").

In addition, Exchange Act Rule 10b-10 requires broker-dealers to disclose, inter alia, brokerage commissions in written trade confirmations required to be sent to customers. 17 C.F.R. § 240.10b-10(a)(2)(i)(B).[22] Further, in order to accelerate the effective date of a registration statement, a registrant must notify the Commission whether the NASD has reviewed the proposed underwriting compensation and "issued a statement expressing no objections to the compensation and other arrangements," and the Commission may deny acceleration if the NASD has not issued such a statement. 17 C.F.R. §§ 230.461(a) & (b)(6). Finally, Regulation S-K, Section 508(3) requires that a registration statement "sets out the nature of the compensation and the amount of discounts and commissions to be paid to the underwriter." 17 C.F.R. § 229.508(e).[23]

For its part, the NASD extensively regulates underwriter compensation and commission practices. For example, the NASD's corporate financing rule: (1) defines what constitutes underwriter compensation; (2) sets limits on the

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[22] *See also* 15 U.S.C. § 78bb(e) (rejecting liability for broker-dealer "solely by reason of his having caused the account to pay a member of an exchange, broker, or dealer an amount of commission for effecting a securities transaction in excess of the amount of commission another member of an exchange, broker, or dealer would have charged for effecting that transaction").

[23] Further, the Commission's Division of Enforcement regularly enforces violations of NASD rules concerning underwriter compensation and commissions. *See, e.g., In re A.S. Goldmen & Co., Inc.*, Exchange Act Release No. 44328, 75 S.E.C. Dkt. 53 (May 21, 2001); *In re Shamrock Partners, Ltd.*, Exchange Act Release No. 40663, 68 S.E.C. Dkt. 1382 (Nov. 12, 1998); *In re William Jackson Blaylock*, Exchange Act Release No. 35002, 58 S.E.C. Dkt. 147 (Nov. 23, 1994), pet. denied, 96 F.3d 1457 (11th Cir. 1996) (table).

amount of compensation that underwriters may receive from issuers and their affiliates; and (3) requires submission of proposed underwriting terms and arrangements for every interstate public offering to the NASD for review and approval prior to distribution. NASD Manual, Rule 2710: Corporate Financing Rule—Underwriting Terms and Arrangements. In addition, NASD Rule 2440, and its accompanying interpretation IM-2440, directly address the fairness and disclosure of commissions charged to a brokerdealer's customers, and provide a non-exclusive list of "relevant factors" that must be considered.

In arguing against the application of implied immunity in this case, the Sherman Act Plaintiffs rely on *In re Public Offering Fee Antitrust Litig.*, No. 98 Civ. 7890 (LMM), 00 Civ. 7804 (LMM), 2003 WL 21496795, at *1 (S.D.N.Y. June 27, 2003) ("*Public Offering Fee*"), a case dealing with underwriter compensation. In *Public Offering Fee*, District Judge Lawrence M. McKenna declined to confer implied immunity where the plaintiffs alleged that certain underwriters, including some of the Underwriter Defendants in this action, colluded to fix the underwriting fees charged to issuers at seven percent of the proceeds of IPOs valued between $ 20 million and $ 80 million. 2003 WL 21496795, at *1. The court rejected the defendants' contention that "implied repeal is appropriate . . . because plaintiffs' claims and any adjudication of these claims . . . would conflict with the 'long-standing, active and pervasive regulation' by the SEC and the NASD of underwriting compensation in public offerings." *Public Offering Fee*, 2003 WL 21496795, at *2. *Public Offering Fee*, however, is distinguishable from this case.

First, the *Public Offering Fee* plaintiffs alleged that the underwriters colluded to fix commissions at a certain percentage, and the court concluded that the defendants "had not provided any statutory or regulatory authority, legislative history or past regulatory activity that even hint that the SEC

or the NASD permit, have permitted or have the authority to permit the fixing of underwriters' IPO fees." 2003 WL 21496795, at *2. Thus, the allegations in *Public Offering Fee* were of a prototypal horizontal price-fixing conspiracy, a narrow issue that is the very evil the Sherman Act was enacted to combat.[24] In contrast, much of the broad-based conduct alleged by the Sherman Act Plaintiffs in this action is permitted under the current securities regulatory regime, *see supra* Section IV.A, while the balance of the allegations are within the scope of the SEC's expansive authority, *see supra* Sections IV.B.1-4, and outside the heartland of Sherman Act prohibitions.

Further, as discussed above, multiple NASD rules define and limit underwriter compensation, and provide a method to determine whether any such compensation is "fair." *See* NASD Manual, Rule 2710: Corporate Financing Rule—Underwriting Terms and Arrangements; NASD Manual, Rule 2440: Fair Prices and Commissions; IM-2440: Mark-Up Policy; *cf. Friedman*, 313 F.3d at 799 ("Implied immunity analysis requires a fairly fact-specific inquiry into the nature and extent of regulatory action that allegedly conflicts with antitrust law."). In addition, under the broad exemptive provisions of the Exchange Act, the SEC has the power to permit a national securities association or exchange to fix any commission or fee structure it sees fit, or to permit certain types of discrimination in the imposition of commissions or fees.[25] Consequently, the SEC, and, by extension, the NASD,

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[24] *See, e.g., Nat'l Collegiate Athletic Ass'n v. Bd. of Regents*, 468 U.S. 85, 107-08 (1984) ("Restrictions on price and output are the paradigmatic examples of restraints of trade that the *Sherman Act* was intended to prohibit.") (citing *Standard Oil Co. v. United States*, 221 U.S. 1, 52-60 (1911)).

[25] *Compare* 15 U.S.C. § 78f (SEC may permit a "national securities exchange to impose a reasonable schedule or fix

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may permit the conduct related to commission practices alleged in this case. Accordingly, a nascent conflict between the securities regulatory regime and antitrust laws emerges. *See Stock Exchanges Options*, 317 F.3d at 149; *Friedman*, 313 F.3d at 801.

Finally, the Sherman Act Plaintiffs' allegations concerning unfair commission practices are properly characterized as manipulative. As a result, implied immunity is warranted because of the Commission's pervasive authority to regulate, and active regulation of, manipulative and deceptive practices under the Exchange Act and related rules. *See supra* Section IV.B.3; *see also In re Initial Pub. Offering Sec. Litig.*, 241 F. Supp. 2d 281, 383 (S.D.N.Y. 2003) (finding a properly-pled 10b-5(b) claim based, inter alia, on a failure to disclose "compensation—in the form of money or commissions" under NASD Rule 2710). The Sherman Act Plaintiffs concede this point. (Pl. Opp. at 26 ("The unambiguous language of the statue and regulations makes clear that Defendants-conspirators allegedly engaged in conduct which violated securities laws on disclosure of

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reasonable rates of commissions, allowances, discounts or other fees to be charged by its members for effecting transactions on such exchange") and 15 U.S.C. § 78o-3(b) (a national securities association may not be registered with the SEC absent a determination by the SEC that its rules "are not designed to permit unfair discrimination between customers, issuers, brokers, or dealers, to fix minimum profits, to impose any schedule or fix rates of commissions, allowances, discounts, or other fees to be charged by its members") *with* 15 U.S.C. § 78mm ("The Commission . . . may conditionally or unconditionally exempt any person, security or transaction, or any class or classes of persons, securities, or transactions, from any provision or provisions of [the Exchange Act] or of any rule or regulation thereunder.").

underwriter compensation.").) Therefore, *Public Offering Fee* does not rescue the Sherman Act Plaintiffs' claims.

C. The SEC's Consideration Of The Conduct At Issue

In *Friedman*, the Second Circuit pointed to the fact that the SEC had repeatedly acknowledged its awareness of the conduct alleged by the plaintiffs, and exercised its regulatory authority over such conduct even though it had never elected to prohibit it, as well as the fact that the Exchange Act "allows price stabilization practices that the SEC does not prohibit," in reaching its determination that implied immunity was required. *Friedman*, 313 F.3d at 802. Similarly, the Second Circuit in *Stock Exchanges Options* noted that the SEC had vacillated between allowing and prohibiting multiple options listing on a number of occasions. *See Stock Exchanges Options*, 317 F.3d at 139-142. Plaintiffs, as well as the DOJ and the NYAG, attempt to distinguish this action from *Friedman* and *Stock Exchanges Options* on these facts, arguing that no such active regulation, or affirmative decision not to regulate, exists with respect to the panoply of conduct alleged in the Sherman Act Complaint. That argument, however, overlooks the Commission's well-documented history of considering the very conduct alleged in this action, and its current activity aimed at formulating responses to the alleged "hot issue" abuses of the late 1990s.

1. The SEC's Prior Consideration Of The Conduct Alleged In The Sherman Act Complaint

In 1974, the Commission proposed, but did not adopt, Proposed Rule 10b-20.[26] *See* Bulletin No. 10 ¶ 2 n.6. The

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[26] Among other things, Rule 10b-20 would have regulated how underwriters allocate securities of new issues, and banned "tie-in (cont'd)

proposed rule would have prohibited broker-dealers, issuers and other distribution participants from: (1) requiring a prospective or actual purchaser of an offering to purchase any other security being offered or sold by any of the entities; (2) in the case of a registered distribution of securities, requiring a prospective or actual purchaser of an offering to pay any consideration other than that indicated in the applicable prospectus; and (3) requiring any other act, conduct, transaction or promise of any purchaser of any security offered for sale by such entities, with certain limited exceptions. Exchange Act Release No. 10636, 39 Fed. Reg. at 7806-07. As the Commission explained in Bulletin No. 10:

> Among other things, [Proposed Rule 10b-20] would have explicitly prohibited broker-dealers (and others) from (explicitly or implicitly) demanding from their customers any payment or consideration (including a requirement to purchase other securities) in addition to the announced offering price of the offered security. This would include, for example, conditioning an allocation of shares in a "hot issue" (for which demand exceeds supply) on an agreement to buy shares in another offering or in the aftermarket of another offering, for which there may be a lack of demand.

Bulletin No. 10 ¶ 2 n.6.

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agreements" in connection with such offerings. *See* Notice of Proposed Rules 10b-20 and 10b-21 and Amendments to Rule 17a-3(a)(6) and 17a-3(a)(7) under the Securities Exchange Act of 1934, Exchange Act Release No. 10636, 39 Fed. Reg. 7806 (Feb. 11, 1974); Exchange Act Release No. 11328, 40 Fed. Reg. 16090 (April 2, 1975). In its proposing release, the Commission noted that one of the rationales for proposed Rule 10b-20 was that some broker-dealers were "imposing requirements involving consideration in addition to the announced price of the shares." 39 Fed. Reg. at 7806.

Proposed Rule 10b-20 was subject to comment for fourteen years. Bulletin No. 10 ¶ 2 n.6. In 1988, it was withdrawn because, inter alia, the SEC "concluded that such agreements [as would have been prohibited under the proposed rule] may be reached under the existing anti-fraud and anti-manipulation provisions of the federal securities laws." Bulletin No. 10 ¶ 2 n.6. In withdrawing proposed Rule 10b-20, the Commission noted that:

> The proposed rule would prohibit broker-dealers and others from explicitly or implicitly demanding from their customers any payment or consideration in addition to the announced offering price of any securities. The proposal was intended to prohibit the practice whereby underwriters induced persons to purchase 'sticky' issues with the opportunity to purchase more attractive 'hot' issues . . . . In view of the substantial period of time that has elapsed since Rule 10b-20 was proposed and the fact that 'tie-in' arrangements may be reached under existing antifraud and anti-manipulation provisions of the federal securities laws, the Commission has determined to withdraw proposed Rule 10b-20.

Withdrawal of Proposed Rules Under the Securities Exchange Act of 1934, Exchange Act Release No. 26182, 53 Fed. Reg. 41,206 (Oct. 20, 1988). Thus, for fourteen years the SEC considered, but eventually rejected, imposing bright-line rules concerning "tie-in" arrangements and other improper aftermarket practices alleged in the Sherman Act Complaint, favoring instead a flexible regulatory approach under its general anti-fraud provisions, now embodied in Regulation M.

In another example of the Commission's past consideration of the conduct at issue in this case, the SEC released the "Report Of The Securities And Exchange Commission Concerning The Hot Issues Markets" in August 1984 (the "Hot Issues Report"). In the Hot Issues Report, the SEC recognized that "generally, the abuses found in a hot

issues market involve either artificial restrictions on supply or attempts to stimulate demand that facilitate a rapid rise in the price of the security." (Hot Issues Report at 29.) The Hot Issues Report recognized, however, that some artificial restrictions on supply and efforts to enhance demand are permissible under certain circumstances. (Hot Issues Report at 29 (noting that it is "important to distinguish the illegal abuse of legitimate practices from legal practices so as to not preclude legitimate actions").)

In the Hot Issues Report, the Commission noted that certain "tie-in arrangements" may violate Sections 9 and 10(b) of the Exchange Act, 15 U.S.C. § 78i & 78j(b), as well as Exchange Act Rule 10b-5, 17 C.F.R. § 240.10b-5, because they "stimulate[] demand for a hot issue in the aftermarket, thereby facilitating the process by which stock prices rise to a premium." (Hot Issues Report at 37-38.) However, the SEC noted that the improper conduct at issue in this case is recurrent in every "hot issue" cycle, and is adequately addressed by existing securities laws without the need to impose unnecessarily rigid limitations antithetical to the Commission's stated goals:

> Existing statutory authority provides the Commission with the necessary flexibility to adopt rules that address hot issues abuses . . . . All of the abuses described in this Report are prohibited by the existing federal securities laws, and the Commission periodically reviews its regulations to assure that they are current. . . . The Commission has maintained vigilant oversight over the hot issues markets and has effectively utilized its adequate statutory and rulemaking authority to reach abuses. The Commission has aggressively ferreted out fraudulent conduct and preserved the integrity of the markets while avoiding unnecessary restrictions on first-time issuers that may stifle creativity, deny essential financing to legitimate businesses, and deter legitimate conduct.

(Hot Issues Report at 76-77, 81-82 (emphasis added).)

Further, when it proposed Regulation M to replace the trading practice rules, the SEC announced that it intended to gather information about aftermarket activities so that it could evaluate whether any additional regulation was necessary. For example, in their proposing release dated April 18, 1996, the Commission recognized the necessity of some aftermarket manipulation by syndicate participants, and once again eschewed bright-line rules prohibiting all aftermarket manipulation in favor of a flexible approach:

> An underwriter's interest in the success of an offering does not necessarily end with the completion of the sales efforts and termination of formal stabilizing activities, but can extend into the "aftermarket" trading in the distributed security (in general, the period immediately following the termination of formal syndicate activity—the so-called "breaking of the syndicate"). Aftermarket participation may be an expected part of the underwriting services provided to an issuer, and the anticipated quality of such services can influence the issuer's selection of a managing underwriter. Underwriters also have an incentive to provide "support" in the aftermarket to counterbalance pressure on the security's price from "flipping" and other selling activity that could adversely affect the investors who have purchased in the offering. In addition, the managing underwriter often purchases shares in the aftermarket period to cover a syndicate short position. Accordingly, the point in time when underwriters no longer have the purpose to "facilitate an offering" cannot be identified with precision.

SEC Release No. 33-7283, 61 Fed. Reg. 17108, 17124 (April 11, 1996) (footnote omitted); *see also* SEC Release No. 33-7375, 62 Fed. Reg. 520, 537-38 (Jan. 3, 1997) ("Syndicate short covering transactions and the imposition of penalty bids by underwriters are activities that can facilitate an offering in a manner similar to stabilization . . . the Commission proposed, and has determined to adopt, the provisions

relating to disclosure, notification, and recordkeeping of syndicate covering transactions and the imposition of penalty bids.").

2. The SEC's Current Consideration of The Conduct At Issue

In its amicus submission, the SEC asserts that it not only considered "tie-in" arrangements and other aftermarket price activity in the past, but in fact is investigating the conduct at issue in this case for potential violations of existing statutes, regulations and rules concerning the price setting process and allocation practices of "hot issue" underwriters. (SEC Amicus Br. at 14 ("The Division of Market Regulation has been conducting an ongoing review of certain aftermarket practices (*e.g.*, overselling, syndicate covering transactions, and penalty bids), in order to decide whether provisions of Regulation M adequately regulate syndicate underwriting practices and provide adequate protection to investors.").)

This ongoing review is embodied in a number of recent Commission and SRO activities. For example, the Commission requested that the NYSE and NASD appoint a "high-level group of business and academic leaders" to investigate whether additional rulemaking was required concerning "IPO allocation practices and the roles of issuers and underwriters in the price setting and offering process." *See* SEC Press Release No. 2002-127 (Aug. 22, 2002), "Chairman Pitt Seeks Review Of Initial Public Offering Process," available at http://www.sec.gov/news/press/2002-127.htm. In addition, in the Final Report of the 2003 Conference on Federal-State Securities Regulation (the "2003 Report"), the Market Regulation working group report noted that "the initial public offering underwriting process has come under a lot of scrutiny lately especially with regard to perceived abuses in the pricing and allocation of IPO shares." Final Report of the 2003 Conference on Federal-State Securities Regulation, II.C.5 (June 2003), available at http://www.sec.gov/info/smallbus/ffedst2003.htm. The 2003

Report notes that "Commission staff reported that it is currently reviewing industry practices regarding the roles of issuers and underwriters in the price setting and the allocation of IPO shares as well as the offering process in general." 2003 Report at C.5.[27]

The NASD is also actively reviewing the conduct at issue in this case in an attempt to determine what, if any, regulatory steps need to be taken. First, the NASD proposed, and the SEC is currently reviewing, Proposed Rule 2790 to replace NASD IM-2110-1, the Free Riding and Withholding Interpretation. SEC Release No. 34-46942 (Dec. 4, 2002). Proposed Rule 2790, titled "Trading in Hot Equity Offerings," was proposed to "focus and streamline [IM-2110-1], as well as to address feedback received in response to our request for comment on NASD rules in need of modernization in Notice to Members 98-81." SEC Release No. 34-46942, at II.A.1. The stated purpose of Proposed Rule 2790, like IM-2110-1, is to "to protect the integrity of the public offering process" by requiring all participants in an offering syndicate to make bona fide public distributions, not to withhold securities for their own benefit, and not to use allocation of securities to reward persons for future business. SEC Release No. 34-46942, at II.A.1.

In addition, the NASD sought comment from its members on whether "to create new Rule 2712 and amend existing Rule 2710 to prohibit certain IPO allocation abuses."

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[27] *See also The Impact of the Global Settlement: Before the Sen. Comm. on Banking, Housing and Urban Affairs*, 108th Cong. 20, at Section V.B (2003) (testimony of Hon. William H. Donaldson, Chairman, SEC) ("Donaldson Testimony") ("In the months ahead, the Commission will continue to examine the IPO practices of the industry to determine whether further Commission or SRO action is necessary, including the possibility of revising existing rules or proposing new rulemaking.").

See NASD Notice to Members No. 02-55: "Regulation of IPO Allocations and Distributions" (August 2002), available at http://www.nasdr.com/pdf-text/0255ntm.pdf. The proposal would largely prohibit the conduct alleged by the Sherman Act Plaintiffs in this action, including:

> the allocation of IPO shares as consideration or inducement for the payment of excessive compensation for other services provided by the member; the solicitation of aftermarket orders for the allocation of IPO shares; the allocation of IPO shares to an executive officer or director of a company on the condition that the officer or director send the company's investment banking business to the member, or as consideration for investment banking services previously rendered; and the imposition of a penalty on registered representatives whose retail customers have "flipped" IPO shares when similar penalties have not been imposed with respect to syndicate members.

NASD Notice No. 02-55. The NASD recognizes that the conduct addressed in this Proposed Rule is already largely prohibited by current SEC and NASD regulation, but is soliciting comment on the theory that the "new, specifically targeted provisions in Rule 2712 would aid member compliance efforts and help to maintain investor confidence in the capital markets." NASD Notice No. 0255; *see also* Donaldson Testimony at Section V.B ("The NASD recently sought comment from its members on its proposed new rules regarding the regulation of IPO allocations and distributions. These rules are intended to better ensure that members avoid unacceptable conduct when they engage in the allocation and distribution of IPOs.").

3. Enforcement Actions Based On The Conduct At Issue

In addition to considering new rules aimed at the conduct at issue in this case, the SEC's Division of Enforcement has

brought injunctive actions alleging underwriter violations of current federal securities laws and NASD rules by broker-dealers engaging in conduct very similar, if not identical, to that alleged in the Sherman Act complaint.[28] Such active regulation of the conduct alleged in the Sherman Act Complaint militates strongly in favor of a finding of

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[28] For example, in *SEC v. J.P. Morgan Securities Inc.*, No. 03 Civ. 02028 (D.D.C.), defendant J.P. Morgan Securities, Inc. ("JP Morgan") consented to entry of a final judgment permanently enjoining it from violating Rule 101 of Regulation M and NASD Rule 2110, and ordering it to pay a $25 million civil penalty, for conduct relating to IPO allocations it underwrote during 1999 and 2000. The Commission's complaint alleges that JP Morgan violated Rule 101 of Regulation M by, inter alia, attempting to induce certain customers to make aftermarket purchases during the restricted period through much of the same conduct alleged in the Sherman Act Complaint.

Similarly, in *SEC v. Robertson Stephens, Inc.*, No. 03 Civ. 0027 (D.D.C.), the Commission filed a civil action against broker-dealer Robertson Stephens, Inc. "relating to the firm's allocation of shares in Initial Public Offerings (IPOs) during 1999 and 2000." In its complaint, the Commission alleged that Robertson Stephens "wrongfully obtained millions of dollars from over 100 customers by allocating shares of 'hot' IPOs to these customers and receiving, in return, profits—in the form of excessive commissions or markdowns—made by these customers on their IPO stock."

In addition, in *SEC v. Credit Suisse First Boston Corp.*, 2002 WL 479836 (D.D.C. Jan. 29, 2002), the district court approved and entered a consent judgment permanently enjoining defendant Credit Suisse First Boston Corp. ("CSFB") from violating certain NASD rules and SEC regulations. The SEC's complaint alleged that CSFB extracted "excessive commissions" from its customers through certain "pay to play" arrangements in which CSFB required its customers to share profits made by flipping IPO shares.

immunity under a *Gordon* analysis. *See Stock Exchanges Options*, 317 F.3d at 147.

D. Implied Immunity And The Sherman Act Plaintiffs' Claims

In *Friedman* and *Stock Exchange Options*, the Second Circuit clarified that the mere potential for conflict, determined by examining the scope of the SEC's regulatory power over the alleged behavior, satisfies the implied immunity doctrine's "plain repugnancy" requirement and mandates that immunity be granted. *See Stock Exchanges Options*, 317 F.3d at 149; *Friedman*, 313 F.3d at 801. In this case, it is clear that the SEC, both directly and through its pervasive oversight of the NASD and other SROs, either expressly permits the conduct alleged in the Sherman Act Complaint or has the power to regulate the conduct such that a failure to find implied immunity would "conflict with an overall regulatory scheme that empowers the [SEC] to allow conduct that the antitrust laws would prohibit." *Stock Exchanges Options*, 317 F.3d at 149.

In its amicus submission, the NYAG acknowledges that "the Second Circuit's [*Stock Exchanges Options*] decision might be read to suggest that implied immunity may be found whenever there is a potential conflict with a regulatory scheme, whether or not that potential materializes into actual conflict." (NYAG Amicus Br. at 10-11.) Nevertheless, the NYAG urges this Court to reject that holding as "unsound as a matter of policy."[29] (NYAG Amicus Br. at 11.) Since implied immunity in this action does not maroon the Sherman Act Plaintiffs, this Court does not share the NYAG's policy concern. The Sherman Act Plaintiffs'

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[29] The Sherman Act Plaintiffs do not address the broader implications of the Second Circuit's language in *Stock Exchanges Options*.

securities fraud claims survived a motion to dismiss in the parallel action, and this Court makes no judgment as to the relative merit of those claims. *See Initial Pub. Offering Sec. Lit.*, 241 F. Supp. 2d at 399.

Undoubtedly, the SEC, the NASD, and other SROs will continue to study the conduct alleged, and enact changes to the current securities regulatory regime that are appropriate in consideration of the Commission's mandate to "balance the benefits of competition against its other regulatory aims." *In re Stock Exch. Options Trading Antitrust Litig.*, 2001 WL 128325, at *10 (S.D.N.Y. Feb 15, 2001), aff'd, 317 F.3d 134 (2d Cir. 2003). Accordingly, the conduct alleged by the Sherman Act Plaintiffs is immune from the application of antitrust laws, and the Underwriter Defendants' motion to dismiss the Sherman Act Complaint's federal antitrust claims is granted.

E. State Antitrust Claims

While Supreme Court and Second Circuit precedent do not address the doctrine of implied immunity as it relates to state antitrust laws, reason and common sense compel the conclusion that the same conduct that is immune from Sherman Act antitrust scrutiny must also be immune from state antritrust scrutiny. Any other outcome would eviscerate the implied immunity doctrine. To shield the securities regulatory regime from encroachment by the Sherman Act, only to expose that regime to assault by a swarm of state antitrust claims, would shatter the federal regulatory framework for national securities markets. *Cf. Stock Exchanges Options*, 2001 WL 128325, at *11 ("bifurcating antitrust immunity according to the status of the defendant undoubtably would undermine this Court's holding . . . . If this were so, the application of antitrust immunity would be rendered nugatory."). This Court will not countenance such a mischievous result. Accordingly, the Sherman Act Plaintiffs' state antitrust claims are also dismissed under the doctrine of

implied immunity. As a result, the Underwriter Defendants' motion to dismiss the Sherman Act Complaint is granted.

V. The Robinson-Patman Act Complaint

The Robinson-Patman Act Complaint, charging a violation of Section 2(c) of the Robinson-Patman Act, alleges nearly all of the same conduct described by the *Sherman Act* Plaintiffs in their complaint, but adds allegations of conduct by defendants that discouraged "flipping." (Robinson-Patman Act Compl. ¶¶ 64-71, 74-89.) In *Friedman*, the Second Circuit held that implied immunity from antitrust regulation was proper for broker-dealer conduct discouraging "flipping" of IPO shares because "allowing an antitrust lawsuit to proceed would conflict with Congress' implicit determination that the SEC should regulate the alleged anti-competitive conduct." 313 F.3d at 801. This Court agrees with the Second Circuit's determination in *Friedman* that practices designed to combat "flipping" are immune from antitrust scrutiny. For this reason, and those set forth earlier in this Memorandum and Order concerning the conduct alleged in the Sherman Act Complaint, this Court holds that implied immunity is warranted with respect to the Robinson-Patman Act Plaintiffs' claims. Accordingly, the Underwriter Defendants' motion to dismiss the Robinson-Patman Act Complaint is granted.

CONCLUSION

For the reasons set forth above, the Underwriter Defendants' motion to dismiss this action on the grounds of implied immunity is granted, and both the Sherman Act Complaint and the Robinson-Patman Act Complaint are dismissed with prejudice as against all defendants. The Clerk of Court is directed to mark this case closed.

Dated: November 3, 2003

New York, New York

SO ORDERED:

/s/ William H. Pauley III

U.S.D.J.

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Glen Billing, individually and on behalf of all those similarly situated, et al.,

Plaintiffs-Appellants,

v.

Credit Suisse First Boston Ltd., et al.,

Defendants-Appellees.

Date:	1/11/06
Docket Number:	03-9284-cv
Short Title:	Billing v. Credit Suisse First
DC Docket Number:	01-cv-2014
DC:	SDNY (NEW YORK CITY)
DC Judge:	Honorable William Pauley

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, Foley Square, in the City of New York, on the 12th day of January two thousand six.

A petition for panel rehearing and a petition for rehearing en banc having been filed herein by the Appellee Credit Suisse First Boston. Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is **DENIED**.

It is further noted that the petition for rehearing en banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

For the Court,
Roseann B. MacKechnie, Clerk
By: /s/ _____
Motion Staff Attorney

APPENDIX D

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE INITIAL PUBLIC OFFERING ANTITRUST LITIGATION	:	Case No. 01 CIV 2014 (WHP)

MEMORANDUM *AMICUS CURIAE* OF THE SECURITIES AND EXCHANGE COMMISSION, SUBMITTED AT THE REQUEST OF THE COURT

Of Counsel
MEYER EISENBERG
Deputy General Counsel

ERIC SUMMERGRAD
Deputy Solicitor

MARK PENNINGTON
Assistant General Counsel

SECURITIES AND
EXCHANGE COMMISSION
450 5th ST. NW
Washington, D.C. 20549-0606
202-942-0928

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INTRODUCTION

Plaintiffs in these consolidated cases claim, in essence, that defendants have engaged in misconduct in the course of selling securities, yet they seek to pursue their claims under the antitrust laws, thus avoiding the pleading and other requirements for stating a private right of action for violation of the securities laws. The Court has requested the Securities and Exchange Commission to advise the Court of its views as to whether "the IPO allocation and commission practices challenged" in these consolidated antitrust cases "are comprehensively regulated under the securities laws, and thus impliedly immune from scrutiny under the antitrust laws." Order of August 8, 2002. For the reasons discussed below, the Commission answers yes to the issue raised by the Court. Moreover, implied immunity is necessary in the context of syndicated securities offerings in order to make the regulatory scheme expressed by Congress in the securities laws work.

The IPO allocation and commission practices challenged fall within the very heart of the Commission's regulatory authority over underwriting syndicates under both the Securities Act of 1933, 15 U.S.C. 77a, *et seq.*, and the Securities Exchange Act of 1934, 15 U.S.C. 78a, *et seq.*, and they are comprehensively regulated. Indeed, much of the joint conduct among syndicate members that is alleged by plaintiffs is conduct that is necessary to the offering process, and that is permitted under the Commission's rules. To the extent that plaintiffs allege conduct that may violate current law, or that threatens harm to investors or to the markets, the Commission is well aware of the issues that have been raised in this area, including the types of practices alleged by plaintiffs. It is actively pursuing comprehensive regulatory

responses to those concerns, including possible enforcement actions and rulemaking.[1]

In particular, the Commission has announced that it is pursuing enforcement investigations to determine whether underwriters have complied with the existing statutes, rules and rules concerning IPOs; securities self-regulatory organizations that it oversees are considering whether to adopt additional rules; and the Commission's Chairman has requested the New York Stock Exchange and National Association of Securities Dealers to jointly convene a Blue Ribbon panel to review the IPO process in order to determine whether additional rulemaking is required to strengthen the integrity of the offering process and to better protect investors.

Permitting the possibility of antitrust liability for conduct that is under comprehensive scrutiny by the agency charged with determining what conduct is permissible and what is not would disrupt the Commission's regulatory regime, as established by Congress, including particularly its ongoing

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[1] The parties have treated the complaint in *In re Initial Public Offering Antitrust Litigation* as the lead pleading, and we will follow that course as well. Plaintiffs in *Pfeiffer v. Credit Suisse First Boston Corp.* allege similar misconduct, though they rest their case on the commercial bribery provisions of the Robinson-Patman Act, 15 U.S.C. 13(c), rather than on Section 1 of the Sherman Act. Despite the differences between the theories under which the two cases are brought, in the Commission's view the fundamental point so far as antitrust immunity concerned is the same—all the plaintiffs challenge "allocation and commission practices" that are subject to comprehensive Commission regulation, and their attempts to remedy those claims through the antitrust laws threaten to disrupt the Commission's regulatory regime, as well as the economic conduct that is the subject of that regulation.

regulatory efforts. It could also interfere with the capital raising activities that are the subject of that regulation. Therefore, the Court should not permit the case to go forward, but should instead hold that the antitrust laws are repealed with respect to defendants' conduct as alleged in this case.[2]

I. The Commission has pervasive regulatory authority over the syndicated offering process, including determining the appropriate balance of competition with other public interest and investment protection considerations, and it is actively exercising that authority.

A. Congress has directed the Commission, not private antitrust plaintiffs, to determine the appropriate role for competition in the securities industry.

Congress requires the Commission in carrying out its regulatory responsibilities to consider competitive concerns as part if its consideration of relevant factors. Thus, both the Securities Act and the Exchange Act direct that whenever the

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[2] The Commission expresses no opinion about whether any of the defendants engaged in conduct like that alleged in the complaint, including market manipulation, laddering, unlawful tie-in agreements, and profit sharing. There is no doubt, of course, that conduct by underwriters may violate the securities laws. In its ongoing investigations, the Commission is in the process of ascertaining whether violations of the federal securities laws actually occurred, but those ultimate determinations are not dispositive of the antitrust immunity issue raised in this case. Rather, the basis for immunity here is that applying a different standard than that to be applied by the Commission could impair its ability to carry out its regulatory obligations. Therefore, this brief addresses solely whether there should be antitrust immunity, assuming that plaintiffs have pleaded, and are ultimately able to prove, the alleged misconduct in connection with IPO allocations.

Commission is engaged in rulemaking "and is required to consider or determine whether an action is necessary or appropriate in the public interest," it shall consider "in addition to the protection of investors, whether the action will promote efficiency, competition, and capital formation." Section 2(b) of the Securities Act, 15 U.S.C. 77b(b); Section 3(f) of the Exchange Act, 15 U.S.C. 78c(f).

Similarly, Section 23(a)(2) of the Exchange Act, 15 U.S.C. 78w(a)(2), provides that "in making rules and regulations pursuant to any provisions of this title" the Commission "shall consider among other matters the impact any such rule or regulation would have on competition." And in deciding whether to permit the registration of a national securities association (like NASD), the Commission must determine that the association's rules are designed, among other objectives, "to remove impediments to and perfect the mechanism of a free and open market and a national market system" (Section 15A(b)(6), 15 U.S.C. 78o-3(b)(6)), and that those rules "do not impose any burden on competition not necessary or appropriate in furtherance of the purposes of this title" (Section 15A(b)(9), 15 U.S.C. 78o-3(b)(9)). The plain language of these provisions establishes that the Commission may adopt a rule or regulation, even one that may adversely affect competition, as long as the proposed rule's burden on competition is "necessary or appropriate in furtherance of the purposes of" the federal securities laws.

Thus, Congress has instructed the Commission to consider competition in all of its regulatory efforts, but it has not made promoting competition *the* paramount consideration. As explained in the legislative history to the statute that added Section 23(a) to the Exchange Act in 1975,

> This explicit obligation to balance, against other regulatory criteria and considerations, the competitive implications of self-regulatory and Commission action should not be viewed as requiring the Commission to justify that such actions be the least anti-competitive

> manner of achieving a regulatory objective. Rather, the Commission's obligation is to weigh competitive impact in reaching regulatory conclusions.

S. Rep. 94-75, at 13, *reprinted in* 1975 U.S.C.C.A.N. 179, 191.[3]

As the Court of Appeals for the District of Columbia Circuit observed in rejecting an assertion that the Commission in rulemaking must always adopt the least anticompetitive alternative, "the tendency in antitrust adjudication to view business relationships in the black and white terms of legality or illegality, based solely on their

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[3] In contrast, the Commodity Exchange Act, 7 U.S.C. 1, *et seq.*, the statute at issue in *Strobl v. New York Mercantile Exchange*, 768 F.2d 22 (2d Cir. 1985), requires the Commodity Futures Trading Commission to "take into consideration the public interest to be protected by the antitrust laws and *endeavor to take the least anticompetitive means of achieving the objectives of this Act* as well as the policies and purposes of the" statute when exercising its regulatory authority. 7 U.S.C. 19(b) (emphasis added). The securities laws' emphasis on balancing competition with other concerns also contrasts with the statutory provisions at issue in the Second Circuit's recent decision in *Law Offices of Curtis V. Trinko v. Bell Atlantic Corp.*, 305 F.3d 89 (2d Cir. 2002). Rather than making competition one factor among others, Congress described the purpose of the 1996 Telecommunications Act at issue in that case as being to "'provide for a pro-competitive, de-regulatory national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans by opening all telecommunications markets to competition * * * .'" H.R. Cong. Rep. 104-458, 1996 WL 46795, at *1 (1996)." 305 F.3d at 109. The decision, therefore, brings home the importance of engaging in close analysis of the particular regulatory provisions at issue, rather than formulating broad rules about what sorts of conduct are or are not *always* immune.

competitive or anticompetitive impact, has no place" in evaluating Commission decisions. *Bradford National Clearing Corp. v. SEC*, 590 F.2d 1085, 1104 (D.C. Cir. 1978). In other words, there is no reason "to treat competitive concerns as any more important or any less subject to judicial deference to administrative choices, than any other factor that is relevant to the legality of administrative action." *Id.* Therefore, while enhancing competition "is a factor to be considered" by the Commission, it is up to the Commission to "'balance' those concerns against all others that are relevant under the statute." 590 F.2d at 1104-05.

B. The Commission has comprehensive authority to regulate the syndicate offering process directly, as well as to oversee the securities self-regulatory organizations that are statutorily required to provide additional regulation.

Congress has entrusted the Commission with the responsibility to regulate the system of syndicated underwriting through which defendants are alleged to have implemented their scheme, and the conduct that forms the basis for the complaint. This authority stems from three separate congressional grants of authority: (1) the Commission regulates the offering process under the Securities Act; (2) it has the authority to define and permit or prohibit manipulative acts in the purchase and sale of securities under the Exchange Act; and (3) it has oversight responsibility for the securities self-regulatory organizations that also are required to regulate broker-dealers, including in the offering and trading processes. This authority is plenary—it encompasses all aspects of the underwriting syndication system, as well as aftermarket trading. Acting pursuant to it, the Commission has adopted comprehensive sets of regulations.

1. Commission regulation of the securities offering process.

The Securities Act provides the Commission with authority to regulate the public offering of securities. *See*, Section 5 of the Securities Act, 15 U.S.C. 77e, and the Commission's rules and regulations thereunder; *see generally*, Louis Loss and Joel Seligman, *Fundamentals of Securities Regulation*, 82-113 (4th ed. 2001). Among the restrictions imposed on non-exempt offerings of securities are the prohibition on offers before a registration statement is filed with the Commission, and limitations on the types of oral and written communications that those offering securities may make with potential buyers after the registration statement is filed, but before it becomes effective. The "roadshows" and other communications described by plaintiffs occur during this period. Relevant laws and regulations include Section 2(a)(3) of the Securities Act, 15 U.S.C. 77b(a)(3), which excludes communications among underwriters who are in privity of contract with the issuer of the security from the scope of the offering restrictions; Securities Act Rule 134, 17 C.F.R. 230.134, which assists the process of building the book by permitting collection of indications of interest in the IPO, and Rules 137, 138 and 139, 17 C.F.R. 230.137-139, which are concerned with permitted communications through issuance of research reports.

The Commission's Rules 460 and 461, 17 C.F.R. 230.460, 230.461, further recognize the role the underwriters, acting individually or through a syndicate, play in disseminating information about the securities offering and the issuer of the securities. In making a public interest finding to make a registration statement for an offering effective, the Commission, acting through its Division of Corporation Finance pursuant to delegated authority, will consider, among other things, the adequacy of the disclosures in the registration statement, whether the underwriters have

received and disseminated information in sufficient time to enable investors to make decisions and whether the NASD has approved the underwriter's compensation in the offering.

2. Commission authority to regulate or prohibit manipulative conduct.

A second set of provisions, contained in the Exchange Act, give the Commission authority to define manipulative practices and adopt rules to permit and regulate, or to proscribe and prevent, such conduct. For example, Section 9(a), 15 U.S.C. 78i(a), outlaws certain forms of manipulative conduct involving securities listed on exchanges, and also empowers the Commission to determine whether certain potentially abusive practices involving those securities should be prohibited, permitted, or regulated. Section 10(b), 15 U.S.C. 78j(b), gives the Commission broad rulemaking authority to address manipulation and fraud, declaring it unlawful for any person to employ "any manipulative, deceptive, or other fraudulent device or contrivance in contravention of such rules and regulations as the Commission may prescribe." Section 15(c)(1), 15 U.S.C. 78o(c)(1), prohibits securities broker-dealers, like the underwriter defendants in this case, from effecting any securities transaction "by means of any manipulative, deceptive, or other fraudulent device or contrivance" (Section 15(c)(1)(A)), and also gives the Commission the power for purposes of that section "by rules and regulations, [to] define, and prescribe means reasonably designed to prevent, such acts and practices as are fraudulent, deceptive, or manipulative." 15 U.S.C. 78o(c)(1)(D).

The Commission has implemented these statutes by adopting rules that address manipulate (and deceptive) conduct. *See* Exchange Act Rules 10b-1 through 10b-18, 17 C.F.R. 240.10b-1–240.10b-18; 15c1-1 through 15c1-9, 17 C.F.R. 240.15c1-1–240.15c1-9; 15c2-1 through 15c2-11, 17 C.F.R. 240.15c2-1–240.15c2-11. It has also issued interpretations to clarify what conduct violates those

provisions, and brought enforcement actions to remedy violations.

Of particular relevance to the allegations in this case is Regulation M,17 C.F.R. 242.100-105, adopted in 1996 pursuant to several provisions of the federal securities laws to replace former Rules 10b-6, 10b-6A, 10b-7, 10b-8, and 10b-21 (commonly known as the "trading practice rules") under the Exchange Act. *See* SEC Release No. 33-7375, 62 Fed. Reg. 520 (Dec. 20, 1996).

Like the former trading practice rules, Regulation M's prophylactic prohibitions are intended to prevent those having a financial interest in a distribution from either manipulating the price of a security or boosting its trading volume and thereby misleading potential investors as to the "true" state of the public market for the security being distributed. In particular, Regulation M prohibits issuers, selling security holders, underwriters, and other distribution participants from bidding for or purchasing, or attempting to induce others to bid for or purchase, the securities being distributed during the specified restricted period. Regulation M also governs "stabilization" (efforts to prevent the price to fall below the offering price during the offering) and related activities in connection with an offering, such as syndicate covering transactions and penalty bids.

3. Commission oversight responsibility for the NASD.

Finally, through its regulatory oversight pursuant to the Exchange Act of National Association of Securities Dealers, Inc., the sole national securities association registered with the Commission, the Commission has direct and pervasive authority to oversee the regulation of broker-dealer conduct, such as communications, commissions, and underwriter fee arrangements. *See e.g.*, Exchange Act Sections 3(a)(26), 15A(a) and (b), 15 U.S.C. 78c(a)(26), 78o-3(a) and (b) (conditions for registration with the Commission of a

national securities association that will function as a self-regulatory organization). Section 15A(e) of the Exchange Act, 15 U.S.C. 78o-3(e), and NASD Rule 2740 have the effect of requiring that members of underwriting syndicates be members of the NASD, so that NASD rules governing offerings apply to all syndicate participants.

The NASD comprehensively regulates syndicate practices pursuant to rules that are formally reviewed and approved by the Commission. For example, the NASD's corporate financing rule addresses underwriter compensation, including the amount of compensation that underwriters may receive. *See* NASD Rule 2710. NASD Rule 2330 prohibits member firms from profit sharing in customer accounts. NASD Rule 2110 and IM 2110-1 protect the integrity of the public offering process by requiring participants in the offering syndicate to make *bona fide* offerings, and not to withhold securities for their own benefit or use allocation of securities to reward persons for future business.[4]

* * *

The scope of these three grants of authority, particularly when considered together as parts of a unified regulatory system, demonstrates that Congress intended for the Commission to exercise its broad regulatory mandate with a wide zone of conduct by those involved in the securities industry, and in the public offering process in particular.

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[4] Some of the other NASD rules that address various aspects of the syndicate underwriting process include Rules 4624 and 6540 (penalty bids and syndicate covering transactions by the syndicate manager), and Rule 2770 (disclosure of the selling price in selling agreements). Other SROs also have rules regarding the syndicate underwriting process. *See e.g.* NYSE Rule 392 (disclosure of syndicate members for offerings of listed securities).

B. The Commission is actively pursuing possible regulatory responses to the types of practices alleged by plaintiffs.

1. When it proposed and adopted Regulation M, the Commission announced that it would gather information about activities in the aftermarket for offerings so that it could evaluate whether any additional regulation was necessary. SEC Release No. 33-7283, 61 Fed. Reg. 17108, 17124 (April 11, 1996); SEC Release No. 33-7375, 62 Fed. Reg. at 537-38. The Commission planned this review in order to address commenters' concerns that certain aftermarket activities were manipulative. Pursuant to that announcement, the Division of Market Regulation has been conducting an ongoing review of certain aftermarket practices (*e.g.*, overselling, syndicate covering transactions, and penalty bids), in order to decide whether the provisions of Regulation M adequately regulate syndicate underwriting practices and provide adequate protection to investors.

2. The Commission recently brought an injunctive action alleging that an underwriter violated the federal securities laws and the rules of the NASD by engaging in practices similar to some of those alleged in the complaint. *See* Hunter Dec. Ex. Y, Z.[5] The NASD brought a related disciplinary proceeding alleging that the misconduct also violated NASD rules. The underwriter settled the cases by consenting to the entry of an injunction in the Commission's case and of findings by the NASD, without admitting or denying them. Ex. Z at 3-14. Among the remedial relief

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[5] The gravamen of the Commission's complaint and the NASD action was that the underwriter allocated hot issue shares to customers who agreed to pay the underwriter a portion of their profits from reselling those shares in the form of excessive commissions on transactions in other securities.

agreed to as part of the settlement of the two proceedings, the underwriter agreed to pay a total of $100 million, to be enjoined from future violations, and to adopt extensive new policies and procedures.

3. The Commission has also announced that it and the SROs are investigating possible violations of existing statutes, regulations and rules concerning the price setting process and the allocation practices of the underwriters of some hot issues. "Chairman Pitt Seeks Review of Initial Public Offering Process," SEC Press Release No. 2002-127 (Aug. 22, 2002) (copy attached). Among the allegations the Commission described were that "to obtain IPO allocations, some investors paid excessive commissions, or may have been induced to purchase shares in the aftermarket, distorting the market for these securities."

4. The NASD is actively reviewing these issues, as well. During the past four years, the NASD and the Commission have been involved in the process of restructuring the Free Riding and Withholding Interpretation, NASD IM 2110-1. The Commission has recently issued a release noticing for comment the fourth amendment to the NASD's proposal. If approved, the revised rule would become NASD Rule 2790. *See* SEC Release 34-46942 (Dec. 4, 2002).

In addition, the NASD recently sought comment from its members on proposed new rules regarding the regulation of IPO allocations and distributions. *See*, NASD Notice to Members No. 02-55: "Regulation of IPO Allocations and Distributions" (August 2002)). Among other things, the proposal would prohibit allocation arrangements involving the payment of undisclosed excessive commissions; aftermarket "tie-in" agreements; and the allocation of IPO shares to an executive officer or director of a company on the condition that the officer or director send the company's investment banking business to the member, or as consideration for investment banking services previously

rendered. While no proposals have yet been submitted to the Commission, any that are eventually made would present an opportunity for the Commission and others, through the notice and comment process, to consider whether additional regulatory responses are appropriate.

5. Finally, in August of this year, the Commission Chairman requested the NYSE and NASD to appoint a Blue Ribbon Panel to investigate whether additional rulemaking beyond that now under consideration is required. *See* "Chairman Pitt Seeks Review of Initial Public Offering Process." As explained in the press release, the Chairman asked those SROs "to undertake a broader review of the IPO process to determine if the additional rulemaking being contemplated will be sufficient to strengthen the integrity of the offering process and to better protect investors." Specifically, he "requested that the NASD and NYSE jointly convene a high-level group of business and academic leaders to conduct this broader review, and suggested that this committee should consist of distinguished representatives of issuers, underwriters, investors, academics and other market participants." August 22 Press Release. The committee appointed in response to this request has met twice, and hopes to issue a report by March, 2003.

II. Immunity is necessary in order to permit the regulatory regime to function as envisioned by Congress.

Syndicated underwritings are, by definition, joint activities in which potential competitors fix prices and engage in other collective activity that would raise substantial antitrust concerns, absent an appropriately broad finding of immunity.[6] Immunity is particularly important at this time,

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[6] The Commission discussed the history of syndicate underwriting in *In re NASD, Inc.*, 19 S.E.C. 424, 451-48 (1945). (cont'd)

when the Commission is actively engaged in determining whether various aspects of the regulatory regime applicable to activities related to syndicated underwritings should be revised in light of current conditions to strengthen the integrity of the offering process and to better protect investors, including investigating claims that underwriters have engaged in the sorts of purportedly illegal conduct alleged by plaintiffs.

Though implied immunity is generally to be disfavored, and is to be found "only if necessary to make the subsequent law work, and even then only to the minimum extent necessary," it is well-established that Congress is deemed to have repealed the antitrust laws in enacting statutes creating a regulatory system when there is a "a convincing showing of clear repugnancy between the antitrust laws *and the regulatory system.*" *National Gerimedical Hospital and Gerontology Center v. Blue Cross of Kansas City*, 452 U.S. 378, 388-89 (1981) (emphasis added). "Intent to repeal the antitrust laws is much clearer when a regulatory agency has been empowered to authorize or require the type of conduct under antitrust challenge." *Id.*, *citing United States v. NASD*, 422 U.S. 694, 730-34 (1975); *Gordon v. NYSE*, 422 U.S. 659, 689-90 (1975).

To paraphrase the Supreme Court's language in discussing immunity for securities exchanges performing their self-regulatory function, courts in deciding whether conduct by regulated entities is immune should ascertain

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See also United States v. Morgan, 118 F. Supp. 621, 635-49 (S.D.N.Y. 1953). A more recent discussion of the syndicate underwriting process may be found in Louis Loss and Joel Seligman, *Fundamentals of Securities Regulation*, 66-74 (4th ed. 2001).

whether there is something "built into the regulatory scheme which performs the antitrust function of insuring that" those entities "will not in some cases" act "so as to injure competition which cannot be justified as furthering legitimate" ends within the scope of regulatory regime. *Silver v. NYSE*, 373 U.S. 341, 358 (1963). Under the federal securities laws, it is the Commission, not private antitrust plaintiffs, that is charged with performing the antitrust function of insuring that participants in a syndicated underwriting do not act so as to do injury to competition that is not justified by legitimate regulatory objectives.

In this case, Congress has made its intentions manifest, not implicit, in the express language of the federal securities laws. Thus, in 1975 and again in 1996 Congress amended those laws to expressly direct the Commission to balance competition in its rule makings, establishing a different, and more hospitable, standard for overruling competition than that adopted by the courts when Congress has not spoken. And, as noted above, the Commission is actively in the process of performing that function, both by considering whether enforcement actions are appropriate, and by examining whether regulations and rules should be revised. This process should not be disrupted by allowing antitrust plaintiffs to step in with their own set of standards, which could potentially be inconsistent with the Commission's determinations.

Plaintiffs claim that there can be no repugnance between the antitrust laws and the securities regulatory regime whenever the challenged conduct, if proven, would be contrary to some provision of the securities laws (Pl. Br. 15).[7] This argument—that rather than determining whether

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[7] Plaintiffs do not cite any case that adopts their proposed bright-line rule that any conduct that violates a provision of a regulatory regime cannot be immune from the antitrust laws. Nor

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Congress has entrusted the antitrust function to a regulator, courts should consider whether the challenged *conduct* is consistent with the regulatory regime—was considered and expressly rejected in the leading decision in this area, *Gordon v. NYSE*, 422 U.S. 659 (1975).

In that case, the Supreme Court found immunity for the then-existing system of minimum fixed commissions established by the New York and American Stock Exchanges, even though, like syndicates, fixed commissions involved inherently anticompetitive conduct, and even though the Commission had earlier decided to abolish them after a five year phase-in period. Plaintiff (supported by the Department of Justice) urged that because the Commission had determined to abolish fixed commissions, those commissions could not be thought necessary to the proper functioning of the securities laws. The Court explained that plaintiffs in *Gordon*, like plaintiffs in this case, had "confused two questions," namely the factual question of whether "fixed commission rates are actually necessary to the

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do *United States v. Borden Co.*, 308 U.S. 188, 197-201 (1939) and *Carnation Co. v. Pacific Westbound Conference*, 383 U.S. 213, 215-17 (1966)), in which conduct that had not been approved by the regulator was held not to be immune, support that broad principle. The statutes governing the regulatory regimes at issue in those cases provided that certain agreements that had been approved by the regulator were immune. It would have defeated the Congressional objective if regulated, but unapproved, agreements were also immune. Those decisions, therefore, tell us nothing about the circumstances under which prohibited conduct should be held immune when, rather than expressly stating the conditions for immunity, Congress has instead entrusted a regulator with determining what degree of competition is appropriate.

operation of the exchanges" and the legal question of "whether allowance of an antitrust suit would conflict with the operation of the regulatory scheme which specifically authorizes the SEC to oversee the fixing of commission rates." 422 U.S. at 688. The relevant question was not whether the fixed commissions were consistent with the securities laws, but "whether antitrust immunity, as a matter of law, must be implied in order to permit the Exchange Act to function as envisioned by the Congress." *Id.* The issue of whether fixed rates were appropriate would become important "only when it is determined that there is no antitrust immunity." *Id.*

The Court in *Gordon* thoroughly examined the history of fixed commissions, and of the Commission's authority over commission rates under the Exchange Act, 422 U.S. at 663-82, including the Commission's review and approval of fixed commissions and of the challenged rules over the years, as well as the then-recent amendment to the Exchange Act (Section 19(b)(9)) that explicitly gave the Commission authority to approve fixed commissions in the future. Based on that examination, the Court concluded that the exchange rules establishing minimum commission rates were not subject to the antitrust laws.

The Court's language reached beyond conduct that was permissible under the Commission's rules, and held that the statutory framework and the Commission's active execution of its duties under that framework foreclosed antitrust examination of conduct within the Commission's regulatory jurisdiction because of the *potential* that the regulator and the antitrust court could impose different standards:

> to deny antitrust immunity with respect to commission rates would be to subject the exchanges and their members to conflicting standards. * * * [T]he commission rate practices of the exchanges have been subjected to the scrutiny and approval of the SEC. If antitrust courts were to impose different standards or

> requirements, the exchanges *might* find themselves unable to proceed without violation of the mandate of the courts or of the SEC. Such different standards are likely to result because the sole aim of antitrust legislation is to protect competition, whereas the SEC must consider, in addition, the economic health of the investors, the exchanges, and the securities industry. Given the expertise of the SEC, the confidence the Congress has placed in the agency, and the active roles the SEC and the Congress have taken, permitting courts throughout the country to conduct their own antitrust proceedings *would conflict with the regulatory scheme* authorized by Congress rather than supplement that scheme.

422 U.S. at 689 (emphasis added, footnote omitted).

The Court reiterated this conclusion in language that referred not only to past practices, but also to Congress's then-recent amendment of Section 19(b) of the Exchange Act, which made the Commission's continuing authority explicit:

> In sum, the statutory provision authorizing regulation, § 19(b)(9), the long regulatory practice, and the continued congressional approval illustrated by the new legislation, point to one, and only one, conclusion. *The Securities Exchange Act was intended by the Congress to leave the supervision of the fixing of reasonable rates of commission to the SEC.* Interposition of the antitrust laws, which would bar fixed commission rates as per se violations of the Sherman Act, in the face of positive SEC action, would preclude and prevent the operation of the Exchange Act as intended by Congress and as effectuated through SEC regulatory activity. Implied repeal of the antitrust laws is, in fact, necessary to make the Exchange Act work as it was intended; *failure to imply repeal would render nugatory the legislative*

provision for regulatory agency supervision of exchange commission rates.

422 U.S. at 691 (emphasis added). Thus, in the words of the leading treatise, *Gordon* holds that the antitrust laws are "inapplicable" to the practice of prescribing fixed commission rates "because the Securities Exchange Act had authorized the Securities and Exchange Commission to control or prevent such practices." 1A Phillip E. Areeda and Herbert Hovenkamp, *Antitrust Law*, ¶ 240c5 (2d ed. 2000). For the same reasons, the antitrust laws should be held to be inapplicable to the practices challenged in the case now before the Court because the securities laws authorize the Commission to control or prevent those practices.

Further guidance is found in *United States v. NASD*, 422 U.S. 694 (1975), handed down on the same day as *Gordon*. In that case, the Court upheld immunity for conduct subject to pervasive Commission regulation. Investors and the Department of Justice brought an antitrust challenge against certain restrictions imposed on resale in the secondary market of mutual fund shares. Plaintiffs alleged that the restrictions were both vertical (imposed by mutual fund underwriters in their agreements with broker-dealers) and horizontal (agreed to by the members of the NASD among each other). The purpose of these restrictions was to prevent development of a secondary market for mutual funds, i.e., a market existing outside the usual distribution and redemption channels.

The Court upheld the vertical agreements because Section 22(f) of the Investment Company Act authorized mutual funds to impose restrictions on the negotiability and transferability of their shares, provided, *inter alia*, that the restrictions did not contravene any rules and regulations of the Commission, and the Commission had not adopted any rules that prohibited the challenged conduct. The Court found that agreements were immune from antitrust liability because the Commission's decision not to act was "an informed

administrative judgment that the contractual restrictions employed by the funds to protect their shareholders were appropriate means for combating the problems of the industry." 422 U.S. at 728.

More pertinent to this case is what the Court said about the alleged horizontal agreements, which did not fall within the scope of Section 22(f), but which were nevertheless held to be immune. The Court framed the issue as whether the Commission's "exercise of regulatory authority" under the ICA and the Maloney Act "is sufficiently pervasive to confer implied immunity." 422 U.S. at 730. The Court held that an antitrust challenge was "precluded by the regulatory authority" vested in the Commission:

> There can be little question that the broad regulatory authority conferred upon the SEC by the Maloney and Investment Company Acts enables it to monitor the activities questioned * * * , and the history of Commission regulations suggests no laxity in the exercise of this authority. *To the extent that any of appellees' ancillary activities frustrate the SEC's regulatory objectives it has ample authority to eliminate them.*

422 U.S. at 734 (emphasis added). Using the same reasoning, we conclude that Congress gave the Commission "ample authority" to eliminate practices like those alleged in this case, to the extent that the Commission finds they are inappropriate, and it should be left free to do so.

The Second Circuit has distilled the rules of *Gordon* and *NASD* as follows:

> There are two narrowly-defined situations in which 'repeal' of the Sherman Act will be inferred: first, when an agency acting pursuant to a specific Congressional directive, actively regulates the particular conduct challenged, [*Gordon*], and second, when the regulatory

> scheme is so pervasive that Congress must be assumed to have forsworn the paradigm of competition [*NASD*].

Northeastern Telephone Co. v. AT&T, 651 F.2d 76, 82 (2d Cir. 1981); *see also Finnegan v. Campeau Corp.*, 915 F.2d 824 (2d Cir. 1990) (reviewing antitrust immunity under the securities laws, and discussing the *Gordon* and *NASD* decisions); 1A Phillip E. Areeda and Herbert Hovenkamp, *Antitrust Law* 34-61 (2d ed. 2000). As we have noted, the Commission believes that the challenged conduct is immune under both theories.

The parties before this Court have focused on the Second Circuit's decision in *Strobl v. New York Mercantile Exchange*, 768 F.2d 22 (2d Cir. 1985), *see* Def. Br. at 17-18; Pl. Br. at 24-25. Plaintiff in that case was the victim of a massive price manipulation scheme in potatoes futures, and he sued the perpetrators under both the Commodity Exchange Act and the antitrust laws. Those defendants argued that because of the regulatory regime in place, "conduct specifically prohibited by the [CEA] cannot be the basis for a treble damage award under the antitrust laws." 768 F.2d at 24. The Second Circuit rejected the argument with respect to the conduct and the regulatory regime in that case, but its reasons for doing so support a finding of immunity in the case at bar. The court summarized its views of the relevant teachings of *Silver* and *Gordon* as follows:

> antitrust laws may not apply when such laws would prohibit an action that a regulatory scheme *might* allow. * * * The "plain repugnancy" found in *Gordon* was the *potential* for conflicting standards and the fact that application of antitrust laws would render § 19(b)(9) of the Securities Exchange Act [granting the Commission authority over exchange rules governing the fixing of commission rates] nugatory. Thus, repeal of antitrust jurisdiction cannot be implied simply when the antitrust laws and a regulatory scheme overlap.

768 F.2d at 27 (emphasis added, internal citations omitted).

The court found no immunity because the manipulative conduct alleged was absolutely prohibited by both the antitrust laws and the CEA, so there could be no conflict: "There is no built-in balance in the regulatory scheme of the Act that permits a little price manipulation in order to further some other statutory goal. Quite the opposite, price manipulation is an evil that is always forbidden under every circumstance by both the Commodity Exchange Act and the antitrust laws. Therefore, application of the latter cannot be said to be repugnant to the purposes of the former." 768 F.2d at 28.[8]

The situation under the securities laws is quite different. In contrast to the CEA, "a little price manipulation" is permitted under the securities laws in the form of price stabilization in connection with an offering, subject to detailed Commission regulation. *See* Regulation M, 17 C.F.R. 242.104 (permitting certain conduct to stabilize the price of securities at or below the offering price, providing that the requirements of the regulation are met). And, in

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[8] The court also rejected decisions adopting the so-called "single remedy rule," under which private remedies under a specifically applicable regulatory statute must be pursued "instead of an action under the more general interdiction of the antitrust laws." 768 F.2d at 29, *citing Smith v. Groover*, 468 F. Supp. 105 (N.D. Ill. 1979) and *Schaefer v. First National Bank of Lincolnwood*, 326 F. Supp. 1186 (N.D. Ill. 1970), *aff'd in part and rev'd in part*, 509 F.2d 1287 (7th Cir. 1975), *cert. denied*, 425 U.S. 94 (1976). Defendants do not challenge this aspect of *Strobl*, and consequently, the Commission does not here express any views on the correctness of the single remedy rule. *Cf. Olmsted V. Pruco Life Insurance Company of New Jersey*, 283 F.3d 429, 435 n.5 (2d Cir. 2002) (court will ordinarily not consider an argument raised only by an *amicus*).

contrast to the commodities situation, syndicate underwriting requires potential competitors to come together for the purpose of setting prices and otherwise agreeing on how securities will be offered. More fundamentally, rather than laying down broad statutory bars on all types of manipulative conduct, the securities laws authorize the Commission to adopt and enforce appropriate regulations that balance competition along with other public interest and investor protection concerns.

We have already noted that Sections 9(a), 10(b) and 15(c) of the Exchange Act give the Commission broad authority to define and permit or prohibit activities that could be deemed forms of manipulation. Furthermore, the Securities Act and the Exchange Act grant the Commission broad exemptive authority even with respect to statutory prohibitions and requirements. Section 28 of the Securities Act, 15 U.S.C. 77z-3; Section 36 of the Exchange Act, 15 U.S.C. 78mm. Taken together, the grants of rulemaking authority and exemptive authority give the Commission broad authority to determine what sorts of conduct should be banned as improper manipulation, and also to set the terms under which such conduct may be permitted, if it serves the public interest.

Given this statutory approach of delegating rulemaking and exemptive power instead of adopting broad statutory prohibitions, there is a much greater possibility under the securities laws than under the CEA that the antitrust laws "would prohibit an action that a regulatory scheme might allow," creating the "potential for conflicting standards" and rendering Commission authority over various practices "nugatory." That continues to be true even if the conduct alleged, if properly pleaded and proved, is unlawful under current statutes, rules and regulations. Indeed, it is true even if the Commission ultimately brings enforcement actions challenging this conduct because, as the Supreme Court indicated in *Gordon*, the concern is with protecting the full

scope of the regulatory regime, and of the Commission's freedom to act, not with whether the particular conduct has been approved. Consequently, immunity *is* required here for the same reasons that it was *not* required in *Strobl*.

Thus, unlike the situation addressed in *Strobl*, this case is similar to *Austin Municipal Securities, Inc. v. NASD*, 757 F.2d 676 (5th Cir. 1985), where the court agreed with the Commission that broad immunity was required for an entire process that was subject to Commission oversight. Plaintiffs in *Austin Municipal Securities*, a securities brokerage firm and five of its associates, alleged that competing firms had conspired to initiate an NASD disciplinary proceeding against it as a means of interfering with its business. The court's concern, similar to the Supreme Court's in *Gordon* and the Second Circuit's in *Strobl*, was that "[s]uperimposing the antitrust laws on the securities laws would unduly interfere with the SEC's jurisdiction" because "[c]ourts might fashion standards that are duplicative or inconsistent with the securities laws and SEC rules." 757 F.2d at 695. Furthermore, the court emphasized, the concerns of the antitrust laws will be addressed in the context of Commission oversight of the NASD disciplinary process because Congress required the Commission to evaluate the anticompetitive effects of its actions. *Id.* "Therefore, the federal antitrust laws are not to be applied to the NASD disciplinary process." 757 F.2d at 695. Or, we would add, to the conduct by members of underwriting syndicates challenged here.

In *In re: Stock Exchanges Options Trading Antitrust Litigation*, 171 F. Supp.2d 174 (S.D.N.Y. 2001), the Commission urged that antitrust immunity was not necessary with respect to conduct that the Commission had decided, in the exercise of its policy-making judgment, should be

governed by the competition in a free market rather than by regulation.[9] The Commission cautioned, however, that this did not mean that any conduct that was contrary to Commission rules or regulations could never be immune. Rather, it observed that *Gordon* was not entirely clear on this point, and indicated that in another case there might be a strong indication that Congress "intended the regulator to be the sole authority with respect to the conduct at issue," *citing Ricci v. Chicago Mercantile Exchange*, 409 U.S. 289, 303 (1973), or "there may be ongoing regulatory supervision and fine-tuning of conduct by the regulator that would be impaired if the conduct were subject to antitrust liability." In our view, the conduct alleged by plaintiffs falls into these categories, and it should therefore be immune, even if the Commission decides after investigation that the conduct violated the securities laws.[10] We believe this result is

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[9] The *Options* case differed from this case in that the Commission had made the regulatory decision to permit free competition, rather than regulation, to determine the allocation of options among exchanges. It has never made a comparable decision to deregulate the syndicated offering process. The district court disagreed with the Commission and found that the alleged conduct would be immune out of concern that permitting an antitrust remedy for conduct that was currently prohibited could interfere with the Commission's ability to change its mind in the future. That case is on appeal to the Second Circuit, No. 01-7371 (2d Cir.). But even if the court of appeals concludes that there is no immunity in the *Options* case for the reasons outlined by the Commission in its *amicus* statement, there should still be immunity in this case because the conduct continues to be subject to the Commission's comprehensive regulation.

[10] At approximately the same time as it filed the *Options* statement, the Commission also filed an *amicus* brief in the Second Circuit urging that immunity *should* be found with respect to conduct by underwriters to stabilize the prices of newly offered securities. *Friedman v. Salomon Smith Barney, Inc.*, No. 01-7207 (cont'd)

particularly required now, as the Commission is actively engaged in considering appropriate responses to the very same types of conduct that plaintiffs' allege.

III. Plaintiffs seek to displace the Commission's regulatory authority by basing their antitrust case largely on inferences they wish to draw from certain conduct that is permitted by the Commission, and by giving an antitrust court the responsibility for interpreting and applying the securities laws.

Plaintiffs seek to replace the securities regulatory regime applicable to syndicate underwriting with the antitrust laws. The Commission is not suggesting that any good purpose is served by conduct that violates the securities laws, or that such illegal activities should go unremedied. Rather, it seeks to protect its Congressionally created regulatory authority, and important economic activities that are carried on subject to that authority, from being disrupted by private plaintiffs pursuing claims under the antitrust laws. Decisions on whether the securities laws have been violated, or on whether particular conduct should be regulated or prohibited under those laws, ought to be made in the context of the securities regulatory regime, not as an ancillary question in an antitrust case. It is important to that regime, and to the proper functioning of the economic system that it regulates, to avoid

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(2d Cir.). The Commission relied on the facts that the conduct was subject to the Commission's regulatory oversight under the stabilization rules, that the Commission had long been aware that this conduct often occurred, and that it had not prohibited the conduct. Thus, in the Commission's view, the situation was very similar to horizontal agreements that were found immune in *NASD*. *Friedman*, like *Options*, is also still pending in the court of appeals.

the uncertainties that would arise if an antitrust court ruled that conduct that the Commission considers improper is permissible, or that conduct that the Commission believes should be allowed is unlawful.

In that regard, plaintiffs' complaint raises two substantial difficulties: First, to a large extent, it asks this Court to draw an inference of illegality from the mere fact that defendants acted jointly as participants in syndicate underwritings. Second, and more fundamentally, even if it is assumed that plaintiffs have adequately alleged illegal conduct, that conduct is subject to the Commission's comprehensive regulation, which has been, and is at this time being, actively implemented.

A. Plaintiffs seek to prove an antitrust case based on inferences of illegal conduct drawn from the fact that defendants engaged in certain lawful, regulated conduct.

Plaintiffs' core allegations of violative conduct seem to be that underwriters of technology stocks agreed among themselves to require purchasers of "hot issue" initial public offerings to promise, as a prerequisite to the purchasers receiving allocations in the offering, that they would make aftermarket purchases of securities at times and prices determined by the underwriters, and that they would kick back some of the profits from their transactions in these securities to the underwriters. This scheme, plaintiffs assert, was implemented "through and in connection with their agreements to combine together into underwriting syndicates" (Complaint, ¶ 49).

When plaintiffs turn from these conclusory allegations of an illegal conspiracy to the relatively concrete allegations of specific conduct that is claimed to violate the antitrust laws, however, they allege almost entirely that defendants engaged in joint activities that are necessary to conduct syndicated underwriting under the system that has been used in the

United States for decades, joint activities that are pervasively regulated and approved by the Commission.

Thus, the complaint describes the syndicate underwriting process, and avers that, in plaintiffs' opinion, syndicates are no longer necessary to effectuate offerings. Complaint ¶¶ 36-37. Nonetheless, plaintiffs say, and contrary to the way that plaintiffs believe securities should be offered, "defendants still regularly combine with one another * * * into underwriting syndicates." Complaint ¶ 38. Furthermore, plaintiffs state, defendants agreed that the lead underwriter could distribute all the shares for each offering, and that syndicate members who did not sell all of their allotment nevertheless shared in the underwriters' discount. Complaint ¶ 39. The aforementioned conduct alleged in paragraphs 38 and 39 is permissible under Commission regulations and governing self-regulatory organization rules.

Plaintiffs further aver that defendants engaged in the following activities, none of which are improper under the governing regulations:

> continuously communicating and working together as co-underwriters and members of syndicates and as market makers (Complaint ¶ 45);
>
> collaborating with one another in trade associations such as the SIA (Complaint ¶ 46);
>
> communicating with each other as members of the NASD, belonging to and trading on NASDAQ and securities exchanges, and creating joint ventures such as Stock Edge LLC and Bond Book LLC (Complaint ¶ 47);
>
> holding meetings among top investment bankers, legal officers, and marketing managers (Complaint ¶ 48);
>
> disclosing to each other the identities of the customers to whom they allocated, or intended to allocate, offered securities (Complaint ¶ 56); and maintaining systems that promptly informed defendants of commission, charges,

and other payments that their customers were making and the customers commissions-to-equity rations and turnover ratios (Complaint ¶ 62).

We do not address whether the allegations in the complaint meet the requirements of Fed. R. Civ. P. 8(a). Our concerns are not with pleading standards, but with the harm that will be done to the securities regulatory system, and to the system for offering securities through underwriting syndicates, if antitrust claims may rest on "allegations" that defendants engaged in certain permissible, regulated conduct, combined with conclusory assertions that during the course of these activities, defendants conspired to violate the law.

To sustain a case based on these sorts of allegations threatens the Commission's regulatory authority because certain conduct that the Commission has approved will be the basis for potential antitrust liability, which would have the effect of negating the Commission's determination that the conduct should be permitted, or even that it is necessary in the public interest. It also threatens the syndicate offering system because mere participation in a syndicate could be construed to be sufficient, without more, to uphold a finding of an antitrust violation against all the participants. For that reason alone, the challenged conduct should be held immune.

B. Assuming Plaintiffs Have Adequately Alleged Conduct That Violates the Securities Laws, Immunity is Necessary to Permit the Commission to Carry Out its Regulatory Functions, and to Prevent Interference with the Commission Approved and Regulated Syndicated Underwriting Process.

We have briefly described above the Commission's authority with respect to syndicate underwritings under the Securities Act and the Exchange Act. Pursuant to that authority, the Commission engages in four functions that would be threatened if immunity is denied in this case.

1. The Commission must make rules and regulations that interpret and implement the governing statutory provisions. As noted, the securities laws rely on Commission rulemaking authority to carry out Congress's objectives. For example, in contrast to the commodities statute at issue in *Strobl*, which flatly prohibited manipulation, the securities statutes combine specific statutory provisions with broad grants of rulemaking authority and exemptive authority to the Commission. Competition is to be considered as one factor, but it is not given predominance. Plaintiffs seek to overlay antitrust principles on the Commission's jurisdiction, overruling the Congressional regulatory regime in this respect.

2. In addition to adopting rules and regulations, the Commission must interpret the statutes it administers, as well as its rules and regulations, in various contexts. For instance, plaintiffs allege that defendants' failed to make required prospectus disclosure (Pl. Br. 25-27), while defendants respond that the disclosure was not required by the applicable Commission regulation and NASD rules (Def. Br. 10-12). The Commission has not had occasion to address that issue, yet plaintiffs now ask this Court to interpret those provisions as part of the determination of whether defendants violated the antitrust laws, to lift the antitrust immunity if defendants' interpretation is incorrect, and to hold defendants liable for treble damages.

Plaintiffs also allege that defendants have engaged in a market manipulation. However, as noted, much of the more specific conduct alleged regarding the syndicated offering process is lawful, and other of it may or may not be permissible, depending upon the facts. Certainly there can be clear cut violations of the governing regulations, but application of the securities laws to particular conduct may involve complex considerations of fact, law and policy. These questions should be addressed under the securities laws, not in an antitrust case.

3. The Commission investigates the facts, both of particular transactions and of industry-wide trends and practices. It is currently investigating both aspects of IPO practices. An antitrust court cannot be expected to substitute for the Commission's responsibility to assess whether enforcement actions, legal interpretations, additional rulemaking, or other actions are necessary or appropriate in the public interest, for the protection of investors, to promote capital formation, while protecting competition to an appropriate degree. The proper mechanism to make the relevant determinations is to allow the Commission to administer the regulatory process.

4. Finally, the Commission has an obligation to continue to develop the law in the public interest, to better protect investors and the securities markets in the light of new circumstances. It is doing so at the present time, including through the Blue Ribbon panel the Commission's Chairman asked the NASD and the NYSE to convene. Permitting private antitrust plaintiffs to provide their own solutions to these perceived problems could impede and frustrate the Commission's ongoing efforts.

CONCLUSION

A failure to hold that the alleged conduct was immunized would threaten to disrupt the full range of the Commission's ability to exercise its regulatory authority. Furthermore, the threat of antitrust liability and remedies will likely have a chilling effect on syndicate underwritings and other lawful joint activities, activities of tremendous importance to the economy of the country. Last year, underwriters raised some $2.5 trillion for American companies and, in the past decade, this number was $12 trillion. Regulation of this crucial segment of the economy should remain in the hands of the Commission, where Congress placed it. For those reasons, this Court should follow the lead of the Supreme Court in *Gordon* and *NASD* and hold that the alleged conduct in this case is immune from challenge under the antitrust laws.

Respectfully submitted.

/s/
Eric Summergrad
Deputy Solicitor

/s/
Mark Pennington
Assistant General Counsel

Of Counsel
MEYER EISENBERG
Deputy General Counsel

SECURITIES AND
EXCHANGE COMMISSION
450 5th St. NW
Washington, D.C. 20549-0606
(202) 942-0928

December 20, 2002

[Certificate of Service omitted in printing]

APPENDIX E

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE INITIAL PUBLIC OFFERING ANTITRUST LITIGATION	:	Case No. 01 CIV 2014 (WHP)

MEMORANDUM OF THE UNITED STATES AS AMICUS CURIAE

R. HEWITT PATE
Acting Assistant Attorney General

CATHERINE G. O'SULLIVAN
NANCY C. GARRISON
GEORGE S. BARANKO
Attorneys
Antitrust Division
U.S. Department of Justice
601 D Street NW
Washington, DC 20530
(202) 514-1531

December 20, 2002

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MEMORANDUM OF THE UNITED STATES AS AMICUS CURIAE

The United States submits this Memorandum in response to the Court's request for its views regarding the implied immunity issue raised by defendants' motion to dismiss the complaint under Rule 12(b)(6).

STATEMENT OF INTEREST

The United States has primary responsibility for enforcing the federal antitrust laws, which express the nation's fundamental economic policy in favor of free competition. Accordingly, the United States has an interest in the well-established rule that, although federal regulatory statutes on occasion clearly indicate that Congress intended to limit antitrust enforcement to prevent conflict with other federal policies, implied repeal of the antitrust laws is disfavored and may be found only when and to the extent necessary to make a federal regulatory program work as Congress intended.

QUESTION PRESENTED

Whether antitrust complaints alleging that defendant underwriters violated the federal antitrust laws by imposing charges and conditions prohibited by the securities laws and SEC regulations should be dismissed under Rule 12(b)(6) on implied immunity grounds.

STATEMENT

Plaintiffs are purchasers of certain technology stocks ("the Class Securities"). Defendants are major investment banks; they underwrote initial public offerings (IPOs) of those stocks and provided brokerage services. Am.

Complaint ¶¶ 33, 35.[1] The Amended Complaint alleges that the defendants agreed "to require from customers consideration in addition to the underwriters' discount . . . for allocations of shares of initial public offerings of certain technology-related companies . . . and to inflate the aftermarket prices for such Class Securities, in violation of Section 1 of the Sherman Antitrust Act, 15 U.S.C. § 1." Am. Complaint ¶ 1. Plaintiffs contend that "pursuant to defendants' combination, conspiracy and agreement" these major underwriters required customers to pay, in addition to the authorized IPO prices, additional charges that were not disclosed in the prospectuses. *Id.* ¶ 4. The alleged charges included "non-competitively determined commissions on the purchase and sale of other securities, purchases of an issuer's shares in follow-up or 'secondary' public offerings (for which the underwriters would earn underwriting discounts), [and] commitments to purchase other, less attractive securities." *Id.* ¶¶ 4, 6. Plaintiffs allege that defendants also agreed "to require that, in order to obtain IPO shares of a Class Security, customers had to place bids for and/or purchase quantities of such Class Security in the aftermarket at prices above the IPO price in order to systematically and significantly inflate the after-market prices of IPOs—a practice known as 'laddering.'" *Id.* ¶¶ 4, 7.

Plaintiffs allege that defendants "abused the preexisting practice of combining into underwriting syndicates by implementing the unlawful agreement alleged . . . through such syndicates," Am. Complaint ¶ 5; that plaintiffs and other class members purchased IPO shares either from the underwriters or in the aftermarket, *id.* ¶ 13; and that they were injured "in that [they] paid the anticompetitive charges and inflated aftermarket prices caused by [defendants']

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[1] "Amended Complaint" or "Am. Complaint" refers to the Consolidated Amended Class Action Complaint (Jan. 2, 2002).

unlawful agreement," *Id.* ¶ 9. The Pfeiffer Complaint[2] alleges that the underwriter defendants and institutional investors engaged in "commercial bribery and other conduct in violation of Section 2(c) of the Robinson Patman Act, 15 U.S.C. section 13(c)," Pfeiffer Complaint ¶ 6, as "part of a course of conduct developed by the Underwriter Defendants to inflate the price of particular securities," *id.* ¶ 3.

Defendants moved to dismiss the complaints under Rule 12(b)(6), on the grounds that: (1) "the IPO allocation and commission practices challenged . . . are comprehensively regulated under the securities laws, and thus immune from antitrust scrutiny," D. Mem. at 1;[3] (2) "plaintiffs . . . lack antitrust standing," *id.* at 2; (3) "the Amended Complaint is devoid of any factual allegations" that would establish an antitrust conspiracy, *id.* at 3; and (4) "the Amended Complaint fails to allege a legally cognizable market," *id.* at 4.[4]

This Court requested the Securities Exchange Commission and the Antitrust Division of the United States Department of Justice to present their views on the implied immunity issue.

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[2] "Pfeiffer Complaint" refers to the Class Action Complaint of plaintiff Milton Pfeiffer (Dec. 12, 2001).

[3] "D. Mem." refers to the Joint Memorandum of Law in Support of Defendants' Motion To Dismiss the Federal Law Claims in the Consolidated Amended Complaint (May 24, 2002).

[4] Defendants focus most of their attention on the Consolidated Amended Complaint. They also challenge the Pfeiffer complaint on the grounds of implied immunity and standing. *See* D. Mem. at 7-8, 62-70.

INTRODUCTION AND SUMMARY OF ARGUMENT

The United States expresses no view as to the merits of plaintiffs' claims that defendants have violated the federal antitrust laws. Section 1 of the Sherman Act focuses specifically on agreements that unreasonably restrain competition; the Robinson-Patman Act prohibits certain types of price discrimination. Neither is an all-purpose enforcement mechanism for attacking securities fraud or other illegal conduct.

Plaintiffs' complaints do not specify with precision the scope and nature of the alleged antitrust violations. Indeed, the Amended Complaint includes few specific facts in support of the conclusory allegations that defendants acted in concert and thereby restrained competition to plaintiffs' detriment. The United States takes no position as to whether the complaints are nonetheless sufficient to survive a motion to dismiss under Rule 12(b)(6) for failure to allege an antitrust offense or for lack of standing.

There is no basis at this point, however, for dismissing the complaints on the ground that regulation renders the alleged actions exempt from antitrust scrutiny as defendants claim. Because the Sherman Act implements a fundamental national policy favoring competition, a finding of implied immunity "can be justified only by a convincing showing of clear repugnancy between the antitrust laws and the regulatory system." *National Gerimedical Hospital and Gerontology Center v. Blue Cross of Kansas City*, 452 U.S. 378, 388 (1981) (internal quotation omitted). In the absence of express or implicit authorization under the regulatory scheme for conduct alleged to violate the antitrust laws, there is no conflict and thus no clear repugnancy between the standards of the antitrust laws and federal securities regulation. The Amended Complaint and the Pfeiffer Complaint include allegations of conduct that the securities laws and SEC regulations clearly prohibit. Accordingly,

whether or not defendants have *violated* the Sherman Act or the Robinson-Patman Act, the conduct alleged in the complaints is not *immune* from scrutiny under the antitrust laws.

ARGUMENT

I. Implied Antitrust Immunity Requires a "Convincing Showing of Clear Repugnancy" Between the Regulatory Scheme and the Application of the Antitrust Laws

As the Supreme Court said over twenty years ago: "claims of antitrust immunity in the context of various regulated industries" have been frequent, and "[t]he general principles applicable to such claims are well established." *National Gerimedical Hospital and Gerontology Center v. Blue Cross of Kansas City*, 452 U.S. 378, 388 (1981). Congress may exempt particular businesses or activities from the Sherman Act by an express provision in the regulatory statute. Moreover, in some circumstances, statutes authorizing regulation by an administrative agency may imply Congressional intent that the federal antitrust laws not apply to certain regulated conduct. Because "[t]he antitrust laws represent a 'fundamental national economic policy,'" *id.* (quoting *Carnation Co. v. Pacific Westbound Conference*, 383 U.S. 213, 218 (1966)), however, "'[i]mplied antitrust immunity is not favored, and can be justified only by a convincing showing of clear repugnancy between the antitrust laws and the regulatory system,'" *id.* (quoting *United States v. Nat'l Ass'n of Sec. Dealers*, 422 U.S. 694, 719-20 (1975) ("*NASD*")); *accord, Northeastern Tel. Co. v. Am. Tel. & Tel. Co.*, 651 F.2d 76, 83 (2d Cir. 1981). The Second Circuit has consistently acknowledged and applied this fundamental principle. *E.g., Strobl v. New York Mercantile Exchange*, 768 F.2d 22 (2d Cir. 1985); *Finnegan v. Campeau Corp.*, 915 F.2d 824 (2d Cir. 1990); *Law Offices of Curtis V. Trinko v. Bell Atlantic Corp.*, 294 F.3d 307 (2d Cir. 2002), *petition for cert. filed*, 71 U.S.L.W. 3352 (U.S.

Nov. 1, 2002) (No. 02-682).[5] *See also Friedman v. Salomon/Smith Barney, Inc.*, No. 01-7207, slip op. at 6 (2d Cir. Dec. 20, 2002).

Defendants nonetheless argue for antitrust immunity even in the absence of statutory or regulatory approval—express or implicit—for the alleged conduct. Indeed, they contend that antitrust immunity may be appropriate even when challenged conduct is expressly prohibited by regulatory authorities. *See* Reply at 6, 9. Defendants insist that conduct should be deemed immune "when either (i) Congress has granted the SEC direct authority over the challenged conduct, and the Commission has exercised this authority, or (ii) the conduct at issue is subject to a pervasive regulatory scheme." Reply at 1, *see* D. Mem. at 14-20. In their view, even the possibility that some "potential conflict . . . may arise as the Commission refines the regulatory framework," Reply at 2, is sufficient to immunize past conduct in the securities industry from the antitrust laws. Defendants' novel and expansive view of implied antitrust immunity cannot be reconciled with

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[5] Defendants' attempt to distinguish *Trinko* as involving the communications laws rather than the securities laws (Joint Reply Memorandum of Law in Support of Defendants' Motion To Dismiss the Federal Law Claims in the Consolidated Amended Complaint at 3-4 (Aug. 7, 2002) ("Reply")) is inapposite. The Second Circuit expressly relied on "basic principles" developed in cases involving immunity claims based on securities, banking, and electric power regulation. *See Trinko*, 294 F.3d at 324-28. Moreover, even before the 1996 Act, the courts consistently had held that telecommunications carriers, while subject to extensive federal and state regulation, do not receive implied antitrust immunity. *E.g.*, *Northeastern Tel.*, 651 F.2d at 82-84. The specific antitrust savings clause in the Telecommunications Act of 1996 simply removed any plausible basis for contentions that Congress intended that Act to repeal (or expand) the antitrust laws as applied to conduct regulated under the Communications Act.

the Supreme Court's insistence on "a convincing showing of clear repugnancy" between the standards of the antitrust laws and the regulatory scheme, *National Gerimedical*, 452 U.S. at 379.

A. Broad Regulatory Scheme Does Not Automatically Displace the Antitrust Laws

The underwriting and sale to the public of newly issued securities are extensively regulated under the federal securities laws, but it does not follow that conduct related to this process is necessarily immune from the antitrust laws. As the courts have made clear, the existence of a regulatory scheme does not automatically establish the clear repugnancy between that scheme and application of the antitrust laws that is necessary to justify a finding of implied repeal. Rather, "'[r]epeal is to be regarded as implied only if necessary to make the [subsequent [regulatory] law] work, and even then only to the minimum extent necessary. This is the guiding principle to reconciliation of the two statutory schemes.'" *National Gerimedical*, 452 U.S. at 388 (quoting *Silver v. New York Stock Exchange*, 373 U.S. 341, 357 (1963)). *Accord*, *Northeastern Tel.*, 651 F.2d at 83 (no implied immunity unless "application of the antitrust laws would be incompatible with the regulatory framework, that is, [unless] immunity must be inferred to make the system work").

Established law thus requires that the courts apply both the antitrust and the regulatory statutes to the extent they do not conflict. The Supreme Court has consistently rejected claims for "a blanket exemption, despite a clear congressional finding that some substitution of regulation for competition was necessary." *National Gerimedical*, 452 U.S. at 392 (citing *Carnation*, 383 U.S. at 217-19 (declining to find "an unstated legislative purpose to free the shipping industry from the antitrust laws")); *Otter Tail Power Co. v. United States*, 410 U.S. 366, 373-74 (1973) (finding no legislative "purpose to insulate electric power companies from the operation of the antitrust laws" despite Federal

Power Commission regulation). Similarly, in *Strobl v. New York Mercantile Exchange*, 768 F.2d 22, 27 (2d Cir. 1985), the Second Circuit expressly rejected the defendants' "over-simplified" argument "that *Silver* and *Gordon* can be read to say that when [an] activity is subject to the jurisdiction of some regulatory body, it is exempt from the antitrust laws." Rather, the question is whether there is "*conflict*[ ] between the antitrust laws and a regulatory scheme." *Id.* (emphasis in original). *See also Friedman*, slip op. at 6.

B. The Key Question Is Whether the Challenged Conduct Has Been Expressly or Implicitly Authorized Under the Regulatory Scheme

If neither Congress nor the regulatory agency has approved or authorized the conduct at issue, explicitly or implicitly, neither the existence nor the exercise of regulatory authority with respect to that conduct creates conflict between the regulatory scheme and the antitrust laws. Rather, there is conflict, warranting an implied exemption only when the antitrust laws "prohibit an action that a regulatory scheme permits." *Finnegan v. Campeau Corp.*, 915 F.2d 824, 828 (2d. Cir. 1990) (citing *Strobl*, 768 F.2d at 27).

This authorization need not take the form of an explicit approval. Rather, conflict can also exist where the SEC "deliberately has chosen" not to exercise its authority to prohibit conduct. *Friedman*, slip op. at 9. Thus, in *Gordon v. New York Stock Exchange*, 422 U.S. 659 (1975), for example, the fixed commission rates at issue had been approved, at the time, by the SEC through actions "having an effect equivalent to that of a formal order," 422 U.S. at 690 n.13. In *NASD*, the Court found immunity for activities expressly authorized by statute, for regulated activities "*approved* by the SEC," and for an alleged conspiracy "to encourage . . . precisely the restriction that the SEC consistently has approved pursuant to [statute] for nearly 35 years." 422 U.S. at 733 (emphasis added). Similarly, in *Finnegan v. Campeau*, the Second Circuit found implied

immunity for joint takeover bids "because the SEC has the power to regulate bidders' agreements under [the Williams Act] . . . *and has implicitly authorized them* by requiring their disclosure . . . as part of a takeover battle." 915 F.2d at 831 (emphasis added). Similarly, the Second Circuit found immunity in *Friedman* where the SEC made a "deliberate and significant" decision to not prohibit the challenged conduct. *Friedman*, slip op. at 11-12.

Implied immunity does not extend beyond the conduct that Congress or the regulatory agency has expressly or implicitly approved. Even an express exemption for agency-approved conduct creates no implied immunity for conduct that has not been approved. *United States v. Borden Co.*, 308 U.S. 188, 197-201 (1939) (Sherman Act was repealed as to marketing agreements approved by the Secretary of Agriculture under the Agricultural Marketing Agreement Act of 1937, but not as to unapproved agreements); *Carnation*, 383 U.S. at 215-17 (price fixing agreements approved by the Federal Maritime Commission under the Shipping Act were exempt from the antitrust laws; unapproved agreements remained subject to the antitrust laws). More generally, implied immunity will not be based on agency authority to regulate a type of conduct if the regulator has not expressly or implicitly exercised its authority and authorized the conduct at issue. *E.g.*, *Northeastern Tel.*, 651 F.2d at 84 (FCC had initially permitted the allegedly anticompetitive tariff conditions to take effect, but because it had never approved the tariff, "no conflict will arise between the Federal Communications Act and the antitrust laws if we hold that [AT&T is] subject to antitrust liability for" those conditions).

Nor does application of the antitrust laws create a conflict if the regulatory agency has exercised its authority to *prohibit* the challenged conduct. Thus, the Second Circuit has squarely rejected the argument that "conduct specifically prohibited by the [applicable regulatory law] cannot be the

basis for a treble damage award under the antitrust laws." *Strobl*, 768 F.2d at 24. Reading *Gordon*, *Silver*, and other Supreme Court decisions to provide that implied repeal of the antitrust laws may be found *only* "when such laws would prohibit an action that a regulatory scheme might allow," 768 F.2d at 27, the Second Circuit in *Strobl* found no antitrust immunity for conduct (price manipulation), prohibited under both the Commodity Exchange Act and the antitrust laws.[6]

The Supreme Court also has underscored the importance of distinguishing between conduct approved under a regulatory scheme and conduct that violates regulatory norms. In *Ricci v. Chicago Mercantile Exchange*, 409 U.S. 289 (1972), the Court affirmed a stay of antitrust litigation pending administrative proceedings to determine whether the conduct at issue violated Chicago Mercantile Exchange rules, reasoning that *if* the conduct "was pursuant to a valid rule," antitrust immunity might be implied. *Id.* at 303. If the conduct was contrary to the rules, however, the basis for an immunity argument "disappears entirely," *id.* at 308, and "the antitrust action should very likely take its normal course,

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[6] The district court in *Stock Exchanges Options Trading Antitrust Litigation*, No. 99 Civ. 962 (RCC), 2001 WL 128325 (S.D.N.Y. Feb. 15, 2001), we submit, did not properly apply established law in dismissing the complaint on implied immunity grounds. The United States has filed a brief as *amicus curiae* urging reversal in the pending Second Circuit appeal. Brief Amicus Curiae of the United States Urging Reversal (July 20, 2001), *Stock Exchange Options Trading Antitrust Litigation*, No. 01-7371 (2d Cir.). The SEC also filed an amicus statement in the district court in the *Options* case expressing its view that the conduct at issue was prohibited by SEC regulations and therefore not immune from the antitrust laws. *See* Statement of the Securities and Exchange Commission, as Amicus Curiae, on the Issue of Implied Repeal of the Antitrust Laws at 5-6 (June 16, 2000).

absent more convincing indications of congressional intent than are present here that the jurisdictional and remedial powers of the [Commodities Exchange] Commission are exclusive," *id.* at 304.

C. Immunity for Past Unapproved Conduct Is Not Required To Preserve Regulatory Flexibility

Defendants assert that the mere possibility of regulatory approval in the future warrants antitrust immunity for past conduct (*see* D. Mem. at 18, 38-40). But, as the Supreme Court has recognized, applying the antitrust laws to conduct that was not approved by the regulators when it occurred does not conflict or interfere with regulatory policy. If the agency (or Congress) changes regulatory policy, subsequent conduct that is authorized under the new policy will be immune from the antitrust laws.[7] In *Carnation*, for example, the Court, drawing on *United States Navigation Co. v. Cunard Steamship Co.*, 284 U.S. 474 (1932), and *Far East Conference v. United States*, 342 U.S. 570 (1952), held that courts may "subject activities which are clearly unlawful under the Shipping Act to antitrust sanctions so long as the courts refrain from taking action which might interfere with the Commission's exercise of its lawful powers." 383 U.S. at 221. And, "[t]he award of treble damages for past and completed conduct which clearly violated the Shipping Act would certainly not interfere with any future action of the Commission." *Id.* at 222. Similarly, injunctive relief that is

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[7] As the SEC explained to the district court in the *Options* case, "'the Commission's regulatory authority to revisit the decision embodied in [the rule prohibiting the conduct at issue] continues, and . . . a different judgment about the desirability of competition in the future could compel a different result on the implied repeal issue.'" 2001 WL 128325 at *9 (quoting SEC Amicus Brief at 7).

not "unconditional," *id.* at 221, would not interfere with future exercise of regulatory discretion.

Gordon v. New York Stock Exchange, 422 U.S. 659 (1975), is wholly consistent with these principles. There, the Court emphasized that the SEC had *approved* fixed commissions at the time the conduct at issue occurred, through actions whose effect was "equivalent to that of a formal order." 422 U.S. at 690 n.13. The SEC's subsequent decision to prohibit fixed commissions did not erase the preexisting conflict of standards as to the conduct for which treble damages were claimed, and a refusal to recognize immunity for conduct approved when it occurred "would render nugatory the legislative provision for regulatory agency supervision of exchange commission rates." *Id.* at 691. The Court had no occasion in *Gordon* to rule on conduct that was not approved when it occurred, and its emphasis on the SEC's prior approval of fixed commission rates negates any suggestion that the Court considered the mere possibility of future regulatory approval a sufficient reason to find antitrust immunity. *See Strobl*, 768 F.2d at 27. *See also Friedman*, slip op. at 11-12 (SEC made a "deliberate and significant" decision not to prohibit conduct).

II. Because the Complaints Allege Conduct Prohibited by the Securities Laws, They Should Not Be Dismissed on Implied Immunity Grounds Under Rule 12(b)(6)

A Rule 12(b)(6) motion must be denied unless "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957); *Gant v. Wallingford Bd. of Educ.*, 69 F.3d 669, 673 (2d Cir. 1995). In this case, the Amended Complaint and plaintiffs' response to the motion to dismiss are less than clear as to who made the alleged agreement, what they agreed to do, what competition was restrained, and how the alleged competitive restraint operated to plaintiffs' detriment. Pfeiffer's complaint is similarly vague as to the "bribery" scheme he alleges.

Whatever the merits of these complaints as a matter of antitrust law—an issue on which the United States expresses no view – they are based in part on alleged practices that the securities laws and SEC regulations prohibit. Thus the Rule 12(b)(6) motion should not be granted on *implied immunity* grounds.

Prohibitions on fraud and manipulation in the sale of securities have been at the core of federal securities law since enactment of the Securities Act of 1933. Section 17(a) of the 1933 Act, 15 U.S.C. 77q(a), "the 'grandfather' of all the SEC fraud provisions," Louis Loss & Joel Seligman, Fundamentals of Securities Regulation 838 (4th ed. 2001), prohibits all forms of fraud, and untrue or misleading statements or omissions of material facts, in the offer or sale of any securities. Section 9(a) of the Securities Exchange Act of 1934, 15 U.S.C. 78i(a), contains additional prohibitions on manipulation of prices for securities listed on a national securities exchange. Sections 9(a)(1)-(5) of the Exchange Act, 15 U.S.C. 78i(a)(1)-(5) prohibit a variety of transactions and techniques for the purpose of creating a false or misleading appearance of active trading, or for the purpose of raising or depressing the price of a security to induce sales or purchases. Section 9(a)(6), 15 U.S.C. 78i(a)(6), outlaws "pegging, fixing, or stabilizing the price of [a listed] security in contravention of such rules and regulations as the Commission may prescribe."

Securities and Exchange Commission Regulation M, 17 C.F.R. 242, is among the most important of the regulations that implement the statutory prohibitions on fraud and manipulation in connection with an offering of securities. Regulation M specifically provides that it is unlawful (with certain limited exceptions) for underwriters "directly or indirectly, to bid for, purchase, or attempt to induce any person to bid for or purchase, a covered security during the applicable restricted period." Rule 101(a), 17 C.F.R. 242.101(a). Further, "[s]tabilizing is prohibited except for the

purpose of preventing or retarding a decline in the market price of a security." Rule 104(b), 17 C.F.R. 242.104(b).

As the SEC staff has explained, the purpose of Regulation M is "to protect the integrity of the offering process by precluding activities that could artificially influence the market for the offered security." Division of Market Regulation, U.S. Securities and Exchange Comm'n, Staff Legal Bulletin No. 10, Prohibited Solicitations and "Tie-in" Agreements for Aftermarket Purchases ¶ 2 (August 25, 2000) ("Bulletin 10").[8] To that end, "solicitations or other inducements by distribution participants during the distribution to generate purchases in the aftermarket are prohibited until the distribution is completed." *Id.*

In Bulletin 10, the SEC staff addressed "complaints that, while participating in a distribution of securities, underwriters and broker-dealers have solicited their customers to make additional purchases of the offered security after trading in the security begins," and that "some underwriters have required their customers to agree to buy additional shares in the aftermarket as a condition to being allocated shares in the distribution (*i.e.*, 'tie-in' agreements)." Bulletin 10 ¶ 1. Reiterating the SEC's consistent view, the staff explained:

> Tie-in agreements are a particularly egregious form of solicited transaction prohibited by Regulation M. As far back as 1961, the Commission . . . said that such agreements may violate the anti-manipulative provisions of the Exchange Act, particularly Rule 10b-6 (which was replaced by Rules 101 and 102 of Regulation M) under the Exchange Act, and may violate other provisions of the federal securities laws.

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[8] Attached as Addendum A to this memorandum.

> Solicitations and tie-in agreements for aftermarket purchases are manipulative because they undermine the integrity of the market as an independent pricing mechanism for the offered security. Solicitations for aftermarket purchases give purchasers in the offering the impression that there is a scarcity of the offered securities. This can stimulate demand and support the pricing of the offering. Moreover, traders in the aftermarket will not know that the aftermarket demand, which may appear to validate the offering price, has been stimulated by the distribution participants. Underwriters have an incentive to artificially influence aftermarket activity because they have underwritten the risk of the offering, and a poor aftermarket performance could result in reputational and subsequent financial loss.

Id. ¶ 2 (footnotes omitted). Accordingly, the staff cautioned underwriters that "solicitations and tie-in agreements for aftermarket purchases before a distribution is completed are manipulative sales practices prohibited by Rules 101 and 102 of Regulation M, and may violate other anti-fraud and anti-manipulation provisions of the federal securities laws." *Id.* ¶ 3 (footnote omitted).

In this case, plaintiffs contend that they are challenging the kind of solicitation and tie-in agreements that were the subject of Bulletin 10, as well as other fraudulent and manipulative practices prohibited by the securities laws and SEC regulations. *See* Am. Complaint ¶¶ 4, 6, 7; Pfeiffer Complaint ¶ 84; Response at 25-32;[9] Pfeiffer Opp. at 5-6 and

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[9] "Response" refers to Plaintiffs' Corrected Response to Defendants' Motion To Dismiss the Federal Antitrust Claims (July 24, 2002).

n.5.[10] There can be no basis for a contention—and defendants do not argue—that the SEC has expressly or implicitly approved tie-in requirements or agreements to impose them.[11] *Compare Friedman*, slip op. 9-12 (SEC had made deliberate decision not to prohibit practices). Accordingly, because antitrust scrutiny of these allegations would not conflict with or be repugnant to the regulatory scheme, the complaints should not be dismissed on *implied immunity* grounds under Rule 12(b)(6).

The United States does not address whether the Amended Complaint and the Pfeiffer Complaint should be dismissed on *other* grounds under Rule 12(b)(6). If the complaints are not dismissed, of course, plaintiffs will have the burden of proving the alleged antitrust violations. It is unclear at this point what evidence they intend to adduce in support of their generalized assertions. The Amended Complaint alleges that "defendants continuously communicated and worked together as co-underwriters and members of underwriting syndicates," Am. Complaint ¶ 45, and that they "abused the

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[10] "Pfeiffer Opp." refers to the Memorandum on Behalf of Plaintiff Pfeiffer in Opposition to Defendants' Motion to Dismiss the Robinson-Patman Claim Under Section 2(c) (July 8, 2002).

[11] Although the SEC regulations do not specifically address *agreements* among underwriters to engage in prohibited solicitations and tie-ins for aftermarket purchases, the securities law prohibitions do not depend on whether such practices are implemented by individual underwriters, through a syndicate, or pursuant to an industry-wide agreement.

Section 5(c) of the 1933 Act, 15 U.S.C. 77e(c), also prohibits a sale or offer to sell securities unless a registration statement has been filed. *See* Loss and Seligman, *supra*, at 82-84. Alleged requirements that customers purchase stock in any IPO for which a registration statement has not yet been filed would violate this prohibition as well.

preexisting practice of combining into underwriting syndicates by implementing the unlawful agreement alleged . . . through such syndicates," *id.* ¶ 5. Many of the factual allegations of the Amended Complaint as to the "making and implementation of defendants' unlawful agreement," *id.* ¶¶ 44-64, appear merely to describe accepted practices of syndicated underwriters that are approved by the SEC and would not violate the antitrust laws, *see United States v. Morgan*, 118 F.Supp. 621, 691 (S.D.N.Y. 1953); *Friedman v. Solomon/Smith Barney, Inc.*, No. 98 Civ. 5990 (NRB), 2000 WL 1804719 (S.D.N.Y. Dec. 8, 2000), *aff'd*, No. 01-7207 (2d Cir. Dec. 20, 2002).[12] Nonetheless, plaintiffs maintain that while "the [Amended] Complaint describes the 'syndicate system,'" it "does not challenge its propriety." Response at 3.

The United States expresses no view as to the merits of plaintiffs' antitrust complaints. Antitrust suits are not a proper vehicle for advancing complaints about violations of the securities laws under another label. To pursue an antitrust claim, plaintiffs are obliged to plead and prove that defendants' committed conduct meets the standards of the Sherman Act. We submit, however, that the complaints

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[12] Mere evidence that the defendants had an opportunity to conspire while engaging in legal activities will not meet plaintiffs' burden of proof at trial or defeat a defense motion for summary judgment. *See, e.g., United States v. Taubman*, 297 F.3d 161, 166 (2d Cir. 2002) (antitrust conspiracy may not be inferred from mere fact of meetings between persons engaged in competing businesses); *Schwimmer v. Sony Corp. of America*, 677 F.2d 946, 953 (2d Cir. 1982) ("'mere showing of close relations or frequent meetings between the alleged conspirators'" would be "insufficient as a matter of law to warrant the inference of a conspiracy") (quoting *Oreck v. Whirlpool Corp.*, 639 F.2d 75, 79 (2d Cir. 1980)).

should not be dismissed on implied immunity grounds under Rule 12(b)(6) merely because regulated conduct is involved.

CONCLUSION

The Court should not dismiss the complaints on implied immunity grounds under Rule 12(b)(6).

Respectfully submitted.

R. HEWITT PATE
Acting Assistant Attorney General

CATHERINE G. O'SULLIVAN

/s/
NANCY C. GARRISON (NG4640)
GEORGE S. BARANKO
Attorneys
Antitrust Division
U.S. Department of Justice
601 D Street NW
Washington, DC 20530
(202) 514-1531

December 20, 2002

Addendum A

Division of Market Regulation, U.S. Securities and Exchange Comm'n, Staff Legal Bulletin No. 10, Prohibited Solicitations and "Tie-in" Agreements for Aftermarket Purchases (August 25, 2000) ("Bulletin 10")

[omitted]

[Certificate of Service omitted in printing]

APPENDIX F

United States Securities and
Exchange Commission
Washington, D.C. 20549

January 13, 2003

Honorable William H. Pauley, III
United States District Judge
United States Courthouse
500 Pearl Street
New York, NY 10007-1581

Re: *In re Initial Public Offering Antitrust Litigation*,
No. 01-CIV-2014

Dear Judge Pauley:

As the Court is aware, the Securities and Exchange Commission filed a memorandum *amicus curiae* in this case urging that the conduct alleged here is immune from antitrust challenge because of the Commission's regulatory authority over that conduct, particularly at a time when the Commission is actively addressing the conduct in a variety of ways. The Commission wishes to call the Court's attention to two recent Second Circuit decisions that support the Commission's legal arguments, and also to advise the Court of a recent enforcement action filed by the Commission to remedy conduct similar to some of that alleged in plaintiffs' complaint. Copies of both court of appeals decisions, as well as of a press release announcing the enforcement action, are attached.

1. *In re Stock Exchanges Options Trading Antitrust Litigation* In this case, as in the case now before the Court, plaintiffs challenged conduct that was prohibited by the current securities laws. *See* Comm. Mem. 3 n.2 (Commission presumes for sake of argument that plaintiffs have alleged and can prove at least some conduct that violates the securities laws). In *Options*, the conduct was an alleged agreement

among securities exchanges not to multiply list options. Like the conduct at issue in this case, the Commission had comprehensive regulatory authority over the conduct, and it had actively regulated it for many years. The issue was whether the antitrust laws could be applied to that conduct, given that the Commission had concluded that free-market competition rather than regulation should determine on which exchanges options traded, and it had therefore prohibited conduct like that alleged in the case. The court of appeals ruled that the antitrust laws did not apply because of the potential for conflict between those laws and the Commission's regulatory regime despite the fact that at this time both the securities laws and the antitrust laws prohibit the conduct.

The court of appeals's explanation of this holding bears directly on the issue before this court:

A. Antitrust immunity analysis "must focus on the 'potential' for '*conflicts* between the antitrust laws and a[n authorized] regulatory regime.'" *Quoting Strobl v. New York Mercantile Exchange*, 768 F.2d 22, 27 (2d Cir.), *cert. denied* 474 U.S. 1006 (1985) (emphasis and brackets in original). Applying this principle to the conduct alleged in *Options*, the court of appeals concluded that "implied repeal is necessary to preserve the authority of the SEC to regulate that conduct." *Options* 22. Similarly, the Commission emphasized throughout its Memorandum the importance of guarding against potential conflicts between the antitrust laws and its regulatory regime, rather than narrowly focusing on whether some aspect of particular conduct is prohibited under current regulations.

B. The court of appeals emphasized that under the Exchange Act, the Commission is "concerned with more than just the protection of competition, which is the sole aim of antitrust legislation." *Options* 22 (internal quotation marks and citation omitted). In deciding whether to require or prohibit multiple listings, the Commission "has perforce

balanced the interest of promoting competition, on the one hand, against undesirable potential effects, on the other hand, such as market fragmentation, financial injury to regional exchanges, and deleterious structural changes in the markets." *Options* 23 (internal quotation marks and citations omitted). The Commission relied heavily on this consideration in its analysis. Comm. Mem. 4-7; 18-19.

C. As to the argument that no conflict was possible because current securities law prohibits the conduct, the court of appeals explained that this "contention misperceives the proper analytical focus. The appropriateness of an implied repeal does not turn on whether the antitrust laws conflict with the current view of the regulatory agency; rather it turns on whether the antitrust laws conflict with an overall regulatory scheme that *empowers the agency to allow conduct* that the antitrust laws would prohibit" *Options* 23 (emphasis added), *citing Gordon v. New York Stock Exchange, Inc.*, 422 U.S. 659, 690 (1975), *inter alia*. The Commission made the same point, both as to the governing principle, and as to the relevance of *Gordon*. Comm. Mem. 19-23.

D. In language that applies equally to this case as to the case before it, the court of appeals concluded that, "[i]n sum, the SEC has ample statutory authority, which it has repeatedly exercised, to regulate" the challenged conduct, so that even though the Commission's present stance is that the conduct is forbidden,

> the Commission has the power to alter that position if it concludes that other concerns within its domain outweigh the need to protect competition. We see no way to reconcile *that SEC authority*, which may be exercised to permit [the conduct], with the antitrust laws.

Options 25 (emphasis added).

E. Finally, we note that the court of appeals analyzed the governing Supreme Court decisions in a manner quite similar to the way the Commission did.

(1) *Silver v. New York Stock Exchange*, 373 U.S. 341 (1963). The court of appeals read the Supreme Court's decision that the conduct challenged in this case was not immune as resting on two propositions: (1) "[b]ecause the SEC lacked the authority to regulate the conduct challenged * * * there was no potential for the antitrust laws to overlap or conflict with the regulatory power of the SEC;" and (2) "given the absence of SEC authority, there was a need for applicability of the antitrust laws, for if those laws were deemed inapplicable the challenged conduct would be unreviewable." *Options* 17. Neither of those propositions obtains in the case now before this Court, as the Commission has authority to regulate the conduct, and it will therefore determine whether the conduct is appropriate.

(2) *Gordon v. New York Stock Exchange, Inc.*, 422 U.S. 659 (1975). The court of appeals quoted many of the same passages from this decision as did the Commission's memorandum, and reads that decision, as did the Commission, as holding that even conduct prohibited under the current regulatory regime may be held immune in order to prevent potential conflicts. *Compare Options* 18-19, 23-24, *with* Comm. Mem. 19-23. As did the Commission, the court of appeals focused on the facts that the Commission must consider other factors than competition in deciding whether to permit or prohibit particular conduct, and that immunity was necessary to permit proper functioning of "the legislative provision for regulatory agency supervision" of the conduct, even if the conduct is prohibited under current regulations. *Options* 18-19.

(3) *United States v. National Association of Securities Dealers, Inc.*, 422 U.S. 694 (1975). As did the Commission, the court of appeals focused on the Supreme Court's handling of the immunity claims with respect to activities that were ancillary to conduct that the Commission had decided to permit. *Compare Options* 19-20 *with* Comm. Mem. 24-25. The Court held that these activities were immune because the

Commission pervasively regulated the field, it "had ample authority to eliminate them" if it found that they frustrated Commission regulatory objectives, and allowing antitrust liability would pose "a substantial danger" of duplicative and inconsistent standards.

* * *

2. *Friedman v. Salomon/Smith Barney, Inc.* This second decision differs from *Options* and from the case before this court because the alleged conduct at issue there was not contrary to current law. Nevertheless, the analytical framework employed by the court of appeals also strongly supports the conclusion that the conduct alleged in this case is immune from antitrust liability. Indeed, the court of appeals in *Options* quoted extensively from *Friedman*. *See Options* 21-23.

The issue in *Friedman* was whether antitrust immunity applied to certain alleged conduct by underwriters that was intended to stabilize the aftermarket price of newly offered securities. Slip Op. 3. The Commission urged, and the court of appeals agreed, that there should be immunity for this conduct because the Commission had regulatory authority over the conduct, it had long been aware that the conduct often occurred, and it had not prohibited the conduct. *See* Comm. Mem. at 32 n. 10; *Friedman* 9-13.

The following statements of general principles and interpretation of the relevant judicial decisions, however, are as applicable to conduct that is prohibited as to conduct that is permitted under the regulatory regime.

A. "Importantly, the 'plain repugnancy,' or conflict between antitrust and securities laws extends to *potential* as well as actual conflicts." *Friedman* 6 (emphasis added). The Commission's position is based substantially on the potential for conflicts between the policy judgments made by the regulatory regime and the antitrust laws, which is in large measure why it believes immunity should extend to some

forms of conduct that are prohibited under current law. Comm. Mem. 36-40.

B. "[I]mplied immunity analysis requires a fairly fact-specific inquiry into the nature and extent of the regulatory action that allegedly conflicts with the antitrust laws." *Friedman* 6. We have also emphasized the importance of eschewing a broad-brush rule that conduct that is prohibited under current law cannot be immune, and have instead urged a careful focus on the nature of the particular regulatory provisions at issue. Comm. Mem. 6 n. 3.

C. "[I]mplied immunity exists where allowing an antitrust lawsuit to proceed would conflict with Congress's implicit determination that *the SEC should regulate the alleged anticompetitive conduct*. In other words, implied immunity exists where allowing parallel proceedings on antitrust and SEC tracks would subject defendants to conflicting mandates." Slip Op. 9 (emphasis added). This is the Commission's position in a nutshell. Congress has determined that the Commission, not private antitrust plaintiffs, should regulate the challenged conduct, and it should be permitted to do so. Comm. Mem. 4-7.

D. As was true in *Options*, the court's reading of the key cases was in agreement with the Commission's analysis of those cases:

(1) The "key" to the decision in *Strobl v. New York Mercantile Exchange*, 768 F.2d 22 (2d Cir. 1985), the court of appeals explained in *Friedman*, was "the absence of conflict or repugnancy between *the legal schemes*" and the fact that "there was no built-in balance under the Commodity Exchange Act that permitted 'a little price manipulation.'" *Friedman* 7 (emphasis added). In contrast, the court noted, the Exchange Act does permit a little manipulation in the form of stabilization, subject to the Commission's regulatory judgment. *Friedman* 7, *see also id.* 12. We made the same point about *Strobl*, and also observed that even outside the

realm of stabilization, the Exchange Act gives the Commission broad authority to permit, regulate or prohibit conduct that could be deemed manipulative. Comm. Mem. 26-32.

(2) The court of appeals noted that in *United States v. NASD*, 422 U.S. 694 (1975), the Supreme Court held that "'[t]here can be no reconciliation of [the SEC's] *authority* * * * to permit" the types of restrictive agreements among competitors that were challenged in that case "with the Sherman Act's declaration that they are illegal per se,' even though the SEC has not specifically approved the restrictive agreements." *Friedman* 7-8 (emphasis added). We analyzed *NASD* similarly as being a case about the scope of the Commission's pervasive regulatory authority. Comm. Mem. 24-25.

(3) The court of appeals also observed that in *Gordon v. New York Stock Exchange*, 422 U.S. 659 (1975), the Supreme Court found immunity based on the fact that the Commission "had jurisdiction to establish a system of fixed commission rates," and that the Supreme Court had not considered the wisdom of the policy adopted, but "only Congress's intent that *the SEC and not antitrust laws* address the issue." *Friedman* 8 (emphasis added). Again, the Commission supported the same reading of that case. Comm. Mem. 19-23.

(4) Finally, in its discussion of *Silver v. New York Stock Exchange*, 373 U.S. 341 (1963), the court of appeals focused on the fact that "nothing in the SEC regulatory regime at the time [of the decision] performed the 'antitrust function' of considering injuries to competition," but that Congress had since amended the Exchange Act "to require the SEC to take competition, among other things, into account in rulemaking and when reviewing rules of exchanges." *Friedman* 8. Recognition that the Commission has been selected by Congress to perform the "antitrust function" was also a key element of the Commission's argument. Comm. Mem. 18-19.

* * *

3. *SEC v. Robertson Stephens, Inc.*, Litigation Rel. No. 17923 (Jan. 9, 2003). The Commission announced that it had filed a civil action against the broker-dealer Robertson Stephens, Inc. relating to the firm's allocation of shares in initial public offerings. The Commission alleged that Robertson Stephens wrongfully obtained millions of dollars from over 100 customers by allocating shares of "hot" IPOs to these customers and receiving, in return, a share of the profits made by these customers in the IPO stock, which was paid to Robertson Stephens in the form of excessive commissions or markdowns.

Robertson Stephens agreed to settle the matter, without admitting or denying the allegations of the complaint. It consented to entry of a final judgment permanently enjoining it from future violations, and ordering it to pay $23 million in disgorgement, together with a civil penalty of $5 million. (The amount of disgorgement and penalty were reduced in recognition of Robertson Stephens payment of disgorgement and a penalty to the NASD in a related proceeding.)

This action emphasizes the point that the Commission is actively pursuing a variety of remedial steps in this area. It further points out the importance of not permitting private antitrust proceedings to potentially interfere with those efforts by possibly making different interpretations of the securities laws. *Cf.* Comm. Mem. 13-17, 32-33.

Respectfully submitted,

/s/

Marc Pennington
Assistant General Counsel
202-942-0928

cc: Christopher Lovell, Esq.
Russel H. Beatie, Esq.
Robert B. McCaw, Esq.
Nancy C. Garrison

APPENDIX G

United States Securities and
Exchange Commission
Washington, D.C. 20549

March 21, 2005

Roseann B. MacKechnie, Esq.
Clerk, United States Court of Appeals
for the Second Circuit
Thurgood Marshall U.S. Courthouse
40 Foley Square
New York, New York 10007

Re: Response to Court's invitation to file letter brief in *Billing v. Credit Suisse First Boston*, Nos. 03-9284 and 03-9288 (2d Cir.).

Dear Ms. MacKechnie:

By letter of January 4, 2005, the Court invited the Securities and Exchange Commission to submit a letter brief to address three questions in the above-numbered cases.[1] The Commission responds to those questions as follows.

1. **Does the SEC have the authority, under its enabling statutes, to allow underwriters to engage in the alleged conduct, including a conspiracy to inflate aftermarket securities prices?**

The federal securities laws and the Commission's regulations generally prohibit market manipulation, including the types of tie-in and laddering agreements alleged in the

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[1] The Court's letter asks the Commission to respond on behalf of the United States. As an independent regulatory agency, the Commission is not authorized to respond on behalf of the United States.

complaints in these actions. The Commission does not now have pending before it, nor does it currently anticipate any proposals that would permit that sort of conduct. Indeed, as we discuss below, the Commission has brought several recent enforcement actions under its existing prohibitions and, as the Court notes, the Commission has also proposed amending Regulation M, 17 C.F.R. 240.100-105, to strengthen those prohibitions.

The Court has asked, however, whether the Commission would have the authority to permit the alleged conduct, including a conspiracy to inflate aftermarket securities prices. As the Commission explained in its Memorandum *amicus curiae* in the district court, it has broad authority over the registered securities offering process, including authority to permit at least some agreements among underwriters that can have the effect of increasing the aftermarket price over the price that would prevail in the absence of those agreements, and which therefore could be viewed as coming within the terms of the question raised by the Court. The Commission's authority rests not only on Section 9(a) of the Securities Exchange Act, the provision on which plaintiffs have focused, but on other provisions as well.[2] In addition, the Commission has oversight responsibility for the rules of self-regulatory organizations, which can also affect market prices and conditions.[3]

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[2] These include, *inter alia*, Sections 2(a)(3), 5, and 28 of the Securities Act, 15 U.S.C. 77b(a)(3) and e, as well as rules adopted under that Act, as well as Sections 10(b), 15(c), and 36 of the Exchange Act, and rules and regulations adopted under that Act. *See, generally*, Comm. Mem. At 8-11, 28-29.

[3] These include, *inter alia*, NASD Rules 2110, 2110-1, 2710. *See, generally*, Comm. Mem. 12-13. SRO rules may not be approved by the Commission unless the Commission determines that the rules "do not impose any burden on competition not (cont'd)

Thus, as this Court discussed in its decision in *Friedman v. Salomon/Smith Barney, Inc.*, 313 F.3d 796 (2d Cir. 2002), the Commission has permitted underwriters to enter into agreements that can have the effect of restricting the resale of newly offered securities in the days immediately following the onset of trading, a practice known as "flipping." Plaintiffs in that case alleged that defendant firms violated the antitrust laws by denying or restricting stock allocations or commissions to brokers whose retail customers engage in flipping. The Court acknowledged that "flipping causes stock prices to fluctuate—usually downward—and aftermarket sales restrictions are a form of price stabilization." 313 F.3d at 797. Despite the fact that the challenged restrictions could have an upward effect on aftermarket prices, the Court agreed with the Commission's view that agreements among underwriters to impose them were immune from antitrust challenge because the antitrust laws conflicted with the regulatory provisions of the federal securities laws.

In short, the Commission has the authority to allow aftermarket conduct by underwriters conducting registered offerings, including IPOs, that may have the effect of maintaining aftermarket prices at a level higher than would be realized in a market subject to no regulation other than the antitrust laws. That result is inherent in a regulatory system such as the one established by the federal securities laws, which requires the Commission to weigh in the balance other important public interest considerations in addition to concerns about competition. While the Commission can and has approved conduct that affects aftermarket prices

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(... cont'd)

necessary or appropriate in furtherance of the purposes of" the Exchange Act. *See* Sections 6(b)(8) and 15A(b)(9) of the Exchange Act.

following registered offerings, it can do so only where it is persuaded by substantial evidence that the conduct will have other important beneficial effects on the functioning of the securities markets. The Commission may authorize conduct that has anti-competitive effects if the Commission concludes that countervailing benefits demonstrate that such action is necessary or appropriate in the public interest or for the protection of investors.

The precise scope of the Commission's authority to adopt rules or to grant exemptions in this area is difficult to delineate in the abstract because it is impossible to foresee what future developments in the offering process or the Commission's understanding of the public interest and investor protection may require, a difficulty that the district court discussed at the argument in this case. JA 1129-30. Current precedent does not, however, foreclose the Commission's ability in response to future developments to authorize conduct by underwriters that could be characterized as a tie-in or laddering. For example, while it is difficult to envision the circumstances under which the Commission would do so, the Commission could approve an SRO rule that permitted such conduct, assuming the statutory requirements under the Exchange Act were met, including the requirements that the rule be designed to protect investors and the public interest, and that it not impose any burden on competition not necessary or appropriate in furtherance of the purposes of the Act. (As noted above, that conduct, at present, is prohibited, and the Commission is not contemplating that it should be permitted.)

2. If not, how—if at all—could judgment for plaintiffs in this case impede the SEC's ability to regulate or exempt from regulation any underwriters, securities, or transactions?

The Court's second question requires a response only if the Commission concludes it does not have the authority to permit the conduct alleged in the complaint. Nevertheless, it

may be useful to outline why, in the Commission's view, analysis of the question of implied repeal may entail consideration of issues beyond an assessment of the outer limits of the agency's authority to permit particular conduct. As this Court has recognized, "antitrust immunity is not to be presumed from the mere existence of overlapping authority." *In re: Stock Exchanges Options Trading Antitrust Litigation*, 317 F.3d 134, 148 (2d Cir. 2003). In this case, however, we believe that antitrust immunity is appropriate in the intensely regulated area of registered offering underwriting to protect the effectiveness of the regulatory regime established by Congress, even in some cases where it may not be clear that the Commission could (or ever would) authorize the specific conduct alleged by particular plaintiffs.

The foundation of the Commission's position, as explained at greater length in its Memorandum, is that syndicate underwriting of public offerings inherently involves agreements and joint actions among potential competitors, including agreements about price, that, but for the securities regulatory regime, would raise substantial antitrust concern. The Commission, and the NASD subject to Commission oversight, comprehensively and actively regulate the offering process under a set of rules and regulations that have evolved through time to adjust to changes in the market and to regulatory understanding of what is necessary or appropriate in the public interest and for the protection of investors. Under this regulatory regime, competition is one factor that must be weighed in the balance, but it is not necessarily given the predominant weight, nor is the Commission required to adopt the least anti-competitive alternative. *See Bradford National Clearing Corp. v. SEC*, 590 F.2d 1085, 1104 (D.C. Cir. 1978).

While the Supreme Court has observed that intent to repeal the antitrust laws is "much *clearer* when a regulatory agency has been empowered to authorize or require the type of conduct under antitrust challenge," *National Gerimedical*

Hospital and Gerontology Center v. Blue Cross of Kansas City, 452 U.S. 378, 388-89 (1981) (emphasis added, citations omitted), that is not the only circumstance under which immunity is appropriate. Rather, the ultimate issue is whether permitting antitrust liability is clearly repugnant to the "regulatory *system*." *Id.*, 452 U.S. at 389 (emphasis added). As the Supreme Court phrased the issue in *Gordon v. NYSE*, 422 U.S. 659, 688 (1975), the question is "whether allowance of an antitrust suit would conflict with the operation *of the regulatory scheme* which specifically authorizes the SEC to oversee" the conduct that is the basis of the antitrust claim (emphasis added). Thus, the Court explained that the issue was not whether the fixed-commission system challenged in that case was necessary to the operation of the exchanges, but whether immunity should be implied "in order to permit the Exchange Act to function as envisioned by Congress." 422 U.S. at 688; *see also United States v. NASD*, 422 U.S. 694, 730, 734 (1975) (upholding immunity in light of Commission's actively exercised oversight authority under the securities laws); *In re: Stock Exchanges Options Trading Antitrust Litigation*, 317 F.3d 134, 148-50 (2d Cir. 2003) (same). *See Silver v. NYSE*, 373 U.S. 341, 358 (1963) (no immunity found when there was nothing "built into the regulatory scheme which performs the antitrust function of insuring that" regulated entities will not unjustifiably limit competition).

The Exchange Act charges the Commission with broad regulatory authority to oversee the underwriting of registered offerings. While tie-ins and laddering are prohibited by the existing regulatory regime, other cases could involve conduct presenting closer questions. Underwriters and other participants in the underwriting process should not be subjected to the fear that in interpreting and applying the comprehensive governing body of securities laws rules, they could find themselves not only liable for violating the securities laws, but also in an antitrust treble damages action. By discouraging useful interactions among participants in the

offering process that are permitted under the securities laws, the fear of potentially crippling treble damages awards could over-deter conduct that would serve the interests of the markets and the capital formation process. In other words, absent a holding of immunity in this case, rather than being one factor to be weighed by the Commission along with other investor protection factors, antitrust concerns will become the predominant considerations in the underwriting process. Nor should the Commission's ability to interpret, apply, and revise the governing law be displaced by introduction of the antitrust laws as an alternative, potentially competing regulatory scheme.

Not only is the Commission's authority here comprehensive; the Commission has been actively exercising that authority, both in the rulemaking and in the enforcement areas. We advised the district court (Comm. Mem. 13-17) of specific steps being taken by the Commission to investigate the alleged misconduct that forms the basis for this case, and to remedy any violations that it found. Since December 2002, when we filed that Memorandum, the Commission has continued its activities.

On May 29, 2003, the NYSE/NASD IPO Advisory Committee, formed in October 2002 at the request of the Commission's then-Chairman, issued its final report and recommendations, which address the problems evidenced during the hot IPO market of the late 1990s and 2000. *See NYSE/NASD IPO Advisory Committee, Report and Recommendations* (May 2003).

As the Court notes in its letter to us, on October 13, 2004, the Commission proposed amendments to Regulation M (the anti-manipulation rule governing securities offerings). The proposed amendments are intended to prohibit certain activities by underwriters and other distribution participants that can undermine the integrity and fairness of the offering process, particularly with respect to allocations of offered securities. Among other things, the proposed amendments

would add a new Rule 106 to expressly prohibit distribution participants, issuers, and their affiliated purchasers, directly or indirectly, from demanding, soliciting, attempting to induce, or accepting from their customers any consideration in addition to the stated offering price of the security. *See* Securities Exchange Act Release No. 50831 (December 9, 2004), 69 FR 75774 (December 17, 2004).

On December 20, 2004, the Commission published for comment proposed rule changes by the NASD and NYSE arising from recommendations of the IPO Advisory Committee regarding the allocation and distribution of IPOs. *See* "Notice of Filing of Proposed Rule Changes by the New York Stock Exchange, Inc. and the National Association of Securities Dealers, Inc. Relating to the Prohibition of Certain Abuses in the Allocation and Distribution of Shares in Initial Public Offerings," Securities Exchange Act Release No. 50896 (December 20, 2004), 69 FR 77804 (December 28, 2004) [SR-NYSE-2004-12 and SR-NASD-2003-140]. The SRO proposed rule changes include proposals regarding, among other things, *quid pro quo* allocations, "spinning," and penalty bids.

These proposals, like the enforcement proceedings and other steps discussed below, reflect the Commission's comprehensive authority to regulate the underwriting process, and its continued active exercise of that authority. They are additional evidence that Commission regulation of the offering process during the last seventy years has involved a continual adjustment of previous rules to newly emerging or identified problems, balancing and re-balancing relevant factors to protect investors and the public interest. The Commission should be free to revise the applicable regulations to meet new issues as they emerge, giving competitive concerns their due weight under the statutory scheme. *See* Section 3(f) of the Exchange Act, 15 U.S.C. 78c(f).

Further, the Commission has recently completed three enforcement injunctive actions involving underwriters' violations of Regulation M. The Commission's complaints allege that the underwriters attempted to induce customers who received IPO allocations to place purchase orders for additional shares in the aftermarket. *See Morgan Stanley & Co. Incorporated*, Lit. Rel. 19050 (January 25, 2005); *Goldman Sachs & Co.*, Lit. Rel. 19051 (January 25, 2005); *J.P. Morgan Securities Inc.*, Lit. Rel. 18385 (October 1, 2003) (Commission Litigation Releases are available at SEC.gov/litigation). The Commission also brought an injunctive action alleging that an underwriter violated the federal securities laws and NASD rules by allocating shares of "hot" IPOs to customers and receiving, in return, profits—in the form of excessive commissions or markdowns—made by these customers on their FPO stock. *See Robertson Stephens, Inc.*, Lit. Rel. 17923 (January 9, 2003).

In addition, private class actions *under the securities laws* are proceeding in the district court. *See In re Initial Public Offering Securities Litigation*, 2005 U.S. Dist. LEXIS 2121 (S.D.N.Y. February 15, 2005); *In re Initial Public Offering Securities Litigation*, 241 F. Supp.2d 281 (S.D.N.Y. 2003).

These steps are the appropriate responses to any alleged securities law violations. They should not be effectively supplanted by an antitrust action which does not take into account the sensitive countervailing considerations that the securities laws, and the Commission's expert administration, are charged with weighing in the balance.

Finally, we note another possible harmful effect of allowing these actions to proceed. While our response has focused to this point on alleged conduct that the Commission does not allow, the complaint in this case goes further. Plaintiffs' antitrust claims combine "allegations" that defendants engaged in collective conduct *permitted* under the securities regulatory regime (Comm. Mem. 34-36) with

conclusory allegations that in the course of doing so they engaged in impermissible anti-competitive conduct. If this action is permitted to go forward, it could force participants in the securities markets to focus not on complying with the securities laws, but predominantly on avoiding antitrust liability. Thus, as we noted in the district court (Comm. Mem. at 38), one of the claims raised by plaintiffs is that defendants failed to make certain prospectus disclosure, which defendants argue is not required by the applicable Commission regulation and NASD rules. The Commission has not had occasion to address this particular disclosure issue, yet plaintiffs now ask this Court to interpret those provisions as part of the determination of whether defendants violated the antitrust laws, to lift the antitrust immunity if defendants' interpretation is incorrect, and to hold defendants liable for treble damages. The *in terrorem* effect of that sort of liability could distort market participant behavior in ways that are harmful to the overall securities markets. The issue should be addressed under the securities laws, not the antitrust laws.

3. In light of your answers to (1) and (2), are defendants-appellees entitled to implied antitrust immunity in this action?

Based on how judgment for the plaintiffs could impede the Commission's ability to regulate underwriting in registered offerings, as explained in the preceding discussion, we believe that the defendants in this case are entitled to antitrust immunity. We emphasize that a different analysis, and a different result, might be required with respect to conduct that, unlike underwriting in registered offerings, has not been subject to comprehensive and active Commission oversight and regulation.

Enclosed please find three copies of this letter for distribution to the panel considering this case. If you have any questions, please call Mark Pennington, Assistant General Counsel, at 202-942-0928.

Respectfully submitted,

/s/
Giovanni P. Prezioso
General Counsel

Cc: (by fax and overnight delivery):
Christopher Lovell, Esq.
Robert B. McCaw, Esq.

(by fax and messenger)
Makan Delrahim, Esq., Deputy Assistant Attorney General,
United States Dept. of Justice

APPENDIX H

DEPARTMENT OF JUSTICE
Antitrust Division

R. HEWITT PATE
Assistant Attorney General

Main Justice Building
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530-0001
(202) 514-2401
(202) 616-2645 (Fax)
E-mail: antitrust@usdoj.gov
Web site: http://www.usdoj.gov/atr

May 5, 2005

Roseann B. MacKechnie, Esq.
Clerk, United States Court of Appeals
for the Second Circuit
Thurgood Marshall U.S. Courthouse
40 Foley Square—Room 1702
New York, New York 10007

Re: *Billing v. Credit Suisse First Boston*, Nos. 03-9284 and 03-9288 (2d Cir.)—Response of the United States to the Court's Request for Views on the Issue of Implied Antitrust Immunity

Dear Ms. MacKechnie:

This letter brief responds to your March 25, 2005, letter inviting the United States to address the Court's questions on the issue of implied antitrust immunity, questions on which the Securities and Exchange Commission provided its views on March 21, 2005. The United States believes that the Court will find the Commission's detailed description of its authority and regulatory activity in this area helpful. The

United States' view of the case law and legal principles applicable to the conduct at issue, however, is somewhat different from the Commission's, and we reach a somewhat different conclusion on the issue of implied immunity.[1]

(1) Does the SEC have the authority, under its enabling statutes, to allow underwriters to engage in the alleged conduct, including a conspiracy to inflate aftermarket securities price?

As the Commission's letter explains in some detail, "[t]he federal securities laws and the Commission's regulations generally prohibit market manipulation, including the types of tie-in and laddering agreements alleged in the complaints in these actions." SEC Letter at 1.[2] Not surprisingly, "[t]he

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[1] The United States has primary responsibility for enforcing the federal antitrust laws, which express the Nation's fundamental economic policy in favor of free competition. As reflected in its letter brief submitted at the Court's request, the SEC reached a different conclusion than we do on some aspects of the questions raised by the Court. We reviewed the Commission's letter brief before it was filed, but that brief (unlike this brief for the United States) was not approved by the Acting Solicitor General and does not state the views of the United States.

[2] The Commission's enabling statutes include section 17 of the Securities Act of 1933, 15 U.S.C. § 77q, and section 9(a) of the Securities Exchange Act of 1934, 15 U.S.C. § 78i. Sections 9(a)(1) through 9(a)(5), 15 U.S.C. §§ 78i(a)(1)-(5), expressly prohibit certain forms of price manipulation. Other forms of manipulation may be regulated or prohibited by the Commission under section 9(a)(6), 15 U.S.C. § 78i(a)(6) (*see Crane Co. v. Westinghouse Air Brake Co.*, 419 F.2d 787, 793-94 (2d Cir. 1969); *Friedman v. Salomon/Smith Barney, Inc.*, 2000 WL 1804719 at *6 (S.D.N.Y. 2000), *aff'd*, 313 F.3d 796 (2d Cir. 2002), *cert. denied*, 540 U.S. 822 (2003)), as well as under section15(c) of the Exchange Act, 15 U.S.C. § 78o(c). The Commission also has exemption powers (cont'd)

Commission does not now have pending before it, nor does it currently anticipate any proposals that would permit that sort of conduct." SEC Letter at 1. The Commission has emphasized that it brings enforcement actions against such practices and that it has proposed amending SEC Regulation M, 17 C.F.R. § 240.100-105 (the anti-manipulation rule governing securities offerings) to strengthen the existing prohibitions. *See* SEC Letter at 1-2, 4-6.

The SEC noted that "[t]he precise scope of the Commission's authority to adopt rules or to grant exemptions in [the IPO] area is difficult to delineate in the abstract." *Id.* at 3. The United States also views the question posed by the Court as extremely difficult to answer in the abstract; such questions would normally be answered in a specific context on the basis of a detailed agency record. There is no dispute, however, that the securities laws and SEC regulations have long prohibited tying and laddering because of the serious threats such practices pose both to competition and to the proper functioning of the securities markets. Thus, we find it very difficult to imagine circumstances in which the statutory prerequisites to waiver identified by the SEC in its letter brief at 2-3) could ever be satisfied for tying and laddering. In any event, the critical—and undisputed—fact for purposes of this case is that the Commission has never authorized tying and laddering, nor has it ever considered doing so. Accordingly, the United States believes there is no demonstrated "potential for regulatory permission of the conduct at issue." *In re Stock*

(... cont'd)

under section 28 of the Securities Act, 15 U.S.C. § 77z-3, and section 36 of the Exchange Act, 15 U.S.C. § 78mm, and oversight responsibility for securities industry self-regulatory organizations, that the Commission has suggested might be relevant to the questions posed by the Court. *See* SEC Letter at 2 nn.2-3.

Exchanges Options Trading Antitrust Litigation, 317 F.3d 134, 148 (2d Cir. 2003) ("*Options*") (discussing *Strobl v. New York Mercantile Exchange*, 768 F.2d 22, 27-28 (2d Cir. 1985)).

(2) If not, how—if at all—could judgment for plaintiffs in this case impede the SEC's ability to regulate or exempt from regulation any underwriters, securities, or transactions?

This question, the United States submits, must be considered in light of the relevant legal principles and the particular practices challenged in the complaint. Because "[t]he antitrust laws represent a fundamental national economic policy," "[i]mplied antitrust immunity is not favored, and can be justified only by a convincing showing of *clear repugnancy* between the antitrust laws and the regulatory system." *Nat'l Gerimedical Hosp. and Gerontology Ctr. v. Blue Cross of Kansas City*, 452 U.S. 378, 388 (1981) (emphasis added; internal quotation marks and citations omitted); *accord, Gordon v. New York Stock Exchange, Inc.*, 422 U.S. 659, 682 (1975); *Options*, 317 F.3d at 148. The "proper approach" to immunity questions requires "reconcil[ing] the operation of both statutory schemes with one another rather than holding one completely ousted." *Silver v. New York Stock Exchange*, 373 U.S. 341, 357 (1963).

Antitrust immunity cannot "be presumed from the mere existence of overlapping authority." *Options*, 317 F.3d at 148. And even where conflicts between the antitrust laws and the regulatory scheme warrant immunity as to some allegations of a complaint, the "baseline principle" is that repeal of the antitrust laws is implied "'only if necessary to make the [regulatory law] work'" and "'even then only to the minimum extent necessary.'" *Id.* at 145 (quoting *Silver*). While this Court in *Options* held that the history of regulatory approval was sufficient to create immunity, even

with respect to conduct currently prohibited by regulation,[3] that holding does not depart from the well-established rule that the mere existence of overlapping regulatory authority does *not* suffice to create immunity. *Id.* at 148. *Options* involved practices that the SEC had in the past authorized, and the Court noted that the Commission might choose to again permit those practices in the future. In that circumstance, the Court found conflict arising from "an overall regulatory scheme that empowers the agency to allow conduct that the antitrust laws would prohibit." *Id.* at 149.[4]

Absent a demonstrated potential for conflict, however, it is presumed that Congress intended that both the regulatory scheme and the antitrust laws apply. Accordingly, what is required is a "fairly fact-specific inquiry," *Friedman v. Salomon/Smith Barney, Inc.*, 313 F.2d 796, 799 (2d Cir. 2002), *cert. denied*, 540 U.S. 822 (2003), focused on the allegations of the particular case, to determine whether there is a conflict or potential for "'*conflicts* between the antitrust laws and a[n authorized] regulatory scheme,'" arising from express or implicit approval or from the "potential for regulatory permission of the conduct at issue." *Options*, 317

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[3] The United States filed amicus briefs in *Options* arguing that implied immunity should be limited to conduct that was expressly or implicitly approved or permitted under the regulatory scheme at the time it occurred. The *Options* panel took a broader view; this Court denied rehearing en banc. Although the United States disagrees with the result in *Options*, we recognize that it is binding on the panel in this case.

[4] *See also Gordon v. New York Stock Exchange*, 422 U.S. 659, 691 (1975) (implied immunity found for past commission fixing that was authorized under the regulatory scheme when it occurred, where Congress had "explicitly provided that the SEC, under certain circumstances and upon the making of specified findings, may allow reintroduction of fixed rates").

F.3d at 148 (quoting *Strobl*, 768 F.2d at 27 (alteration in *Options*)).

In this case, the district court correctly held that the doctrine of implied immunity bars antitrust challenges to syndication and related practices expressly or implicitly approved by the SEC under the securities laws. *See In re Initial Public Offering Antitrust Litigation*, 287 F. Supp. 2d 497, 506-10 (S.D.N.Y. 2003) ("*IPO*"). As to those practices, there is conflict, and an antitrust judgment would impede the SEC's exercise of its regulatory authority. But the complaints also include challenges to alleged laddering and tie-in agreements that, as the Commission's response to the Court's questions confirms, the Exchange Act proscribes and the SEC recognizes as clear violations of the securities laws that it has never approved or even considered approving. Thus, the United States believes there is no demonstrated "potential for regulatory permission" of those practices, *Options*, 317 F.3d at 148, and, therefore, sees no proper basis for finding a conflict. In these circumstances, enforcement of the antitrust laws as to the laddering and tying allegations does not interfere with the SEC's ability to regulate or exempt from regulation. The district court's holding that the SEC's "sweeping power to regulate" was sufficient to create a potential conflict with the antitrust laws, *IPO*, 287 F. Supp. at 506, amounts to an impermissible finding of antitrust immunity based on "the mere existence of overlapping authority," *Options*, 317 F.3d at 148.

Viewed in the context of the relevant case law, the SEC's active efforts to enforce the regulatory prohibitions neither conflict with nor relieve defendants of their obligations to comply with the federal antitrust laws. In our view, the antitrust laws create no impediment to the SEC's ability to regulate and to enforce the securities laws with respect to the proscribed conduct, and implied immunity for laddering and tying would be particularly inappropriate because it is difficult to imagine any scenario in which the prerequisites

for an exemption to the consistent securities law prohibitions on such conduct could ever be satisfied.[5] Indeed the United States is concerned that the district court's overly expansive

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[5] Congress plainly did not reserve to the SEC the sole right to challenge conduct subject to SEC regulation. A conclusion that the federal antitrust laws are impliedly repealed would not insulate the conduct from private actions under the securities laws, for example. Moreover, a variety of state law remedies might be available. *See, e.g., CTS Corp. v Dynamics Corp. of Am.*, 481 U.S. 69 (1987) (federal securities laws do not generally displace state securities laws). Indeed, although the district court below dismissed state antitrust claims, *IPO*, 287 F.Supp. 2d at 524; Special App. 65-71, it failed to justify that result under the preemption standards set forth by the Supreme Court. In *California v. ARC America Corp.*, 490 U.S. 93, 100-01 (1989), the Court explained that state laws will be preempted only by (a) an express statutory preemption provision; (b) a showing that it is "'clear and manifest'" that "Congress intends that federal law occupy a given field"; or (c) a showing that state law "actually conflicts with federal law, that is, when compliance with both state and federal law is impossible, or when the state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *Id.* (citations omitted). Moreover, Congress included in the securities laws a savings provision, mandating that, with the narrow exception of certain state class actions, "the rights and remedies provided . . . shall be in addition to any and all other rights and remedies that may exist at law or in equity." Securities Act § 16(a), 15 U.S.C. § 77p(a); *see also* Exchange Act § 28(a), 15 U.S.C. § 78bb(a) (similar savings clause). There is no reason to believe that Congress intended to immunize conduct prohibited by the securities laws from scrutiny under the federal antitrust laws, which "represent a fundamental national economic policy," *Nat'l Gerimedical Hosp. and Gerontology Ctr. v. Blue Cross of Kansas City*, 452 U.S. 378, 388 (1981) (quotations and citations omitted), while leaving that same conduct subject to challenge under state antitrust and other laws.

view of implied immunity, if accepted, could impede even joint efforts, like those the Commission and the Department of Justice have successfully undertaken in the past, to protect competition and consumers in the nation's vitally important financial markets by enforcing the securities laws *and* the antitrust laws.[6]

(3) In light of your answers to (1) and (2), are defendants-appellees entitled to implied antitrust immunity in this action?

The United States submits that, under established principles, the district court erred in dismissing the complaints in their entirety under Rule 12(b)(6) on the basis

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[6] *See e.g.*, SEC, "SEC and Department of Justice Sanction Four Options Exchanges for Anticompetitive Conduct," Press Release No. 2000-126 (Sept. 11, 2000) (www.sec.gov/news/press/2000-126.txt); U.S. Dept. of Justice, "Justice Department Files Suit Challenging Anticompetitive Agreement Among Options Exchanges," Press Release No. 00-530 (Sept. 11, 2000) (www.usdoj.gov/atr/public/press_releases/2000/6452.htm); Complaint (filed Sept. 11, 2000), and Stipulated Final Judgment (filed Dec. 6, 2000), *United States v. American Stock Exchange, LLC* (D.D.C. No. 00-2174 (www.usdoj.gov/atr/cases/f6400/6468.htm; www.usdoj.gov/atr/cases/f201200/201201.htm); Competitive Impact Statement, *United States v. Alex Brown & Sons, Inc.*, No. 96-5313 (S.D.N.Y. filed July 17, 1996) (www.usdoj.gov/atr/cases/f0700/0739.htm) (DOJ and SEC collaborated in evidence collection for simultaneous investigation of Nasdaq securities trading); Competitive Impact Statement, *United States v. Steinhardt Management Co.*, No. 94-9044 (www.usdoj.gov/atr/cases/f0800/0819.htm) (S.D.N.Y. filed Dec. 16, 1994) (DOJ and SEC reached global settlement under antitrust and securities laws regarding conspiracy to restrain trading in certain Treasury notes).

of implied immunity.[7] We conclude that defendants-appellees are entitled to implied immunity for conduct expressly or implicitly approved by the securities laws or SEC regulations. Under the holding in *Options*, immunity may also extend to conduct where there is a demonstrated "potential for regulatory permission," 317 F.3d at 148.[8] But the allegations of tying and laddering—practices that are strictly prohibited under the securities laws and that the SEC has never permitted or proposed to permit—should not be dismissed on implied immunity grounds.

Three copies of this letter are enclosed for distribution to the panel considering this case. If you have any questions, please call Catherine G. O'Sullivan, Chief, Appellate Section, Antitrust Division, United States Department of Justice, at 202-514-1531.

Respectfully submitted,

/s/
R. Hewitt Pate
Assistant Attorney General

Cc: Christopher Lovell, Esq., lead counsel for plaintiffs
Robert B. McCaw, Esq., lead counsel for defendants
Giovanni P. Prezioso, General Counsel, SEC

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[7] The United States expresses no view as to the merits of plaintiffs' antitrust complaints.

[8] As noted above, *see supra* note 3, the United States disagrees with the result in *Options*, but we recognize that it is binding on the panel in this case.

APPENDIX I

STATUTES AND REGULATORY GUIDANCE

15 U.S.C. § 1

§ 1. Trusts, etc., in restraint of trade illegal; penalty

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $100,000,000 if a corporation, or, if any other person, $1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court.

15 U.S.C. § 13(c)

§ 13. Discrimination in price, services, or facilities

(c) Payment or acceptance of commission, brokerage or other compensation. It shall be unlawful for any person engaged in commerce, in the course of such commerce, to pay or grant, or to receive or accept, anything of value as a commission, brokerage, or other compensation, or any allowance or discount in lieu thereof, except for services rendered in connection with the sale or purchase of goods, wares, or merchandise, either to the other party to such transaction or to an agent, representative, or other intermediary therein where such intermediary is acting in fact for or in behalf, or is subject to the direct or indirect control, of any party to such transaction other than the person by whom such compensation is so granted or paid.

15 U.S.C. § 77b(b)

§ 77b. Definitions

(b) Consideration of promotion of efficiency, competition, and capital formation. Whenever pursuant to this title the Commission is engaged in rulemaking and is required to consider or determine whether an action is necessary or appropriate in the public interest, the Commission shall also consider, in addition to the protection of investors, whether the action will promote efficiency, competition, and capital formation.

15 U.S.C. § 77k

§ 77k. Civil liabilities on account of false registration statement

(a) Persons possessing cause of action; persons liable. In case any part of the registration statement, when such part became effective, contained an untrue statement of a material fact or omitted to state a material fact required to be stated therein or necessary to make the statements therein not misleading, any person acquiring such security (unless it is proved that at the time of such acquisition he knew of such untruth or omission) may, either at law or in equity, in any court of competent jurisdiction, sue—

(1) every person who signed the registration statement;

(2) every person who was a director of (or person performing similar functions) or partner in, the issuer at the time of the filing of the part of the registration statement with respect to which his liability is asserted;

(3) every person who, with his consent, is named in the registration statement as being or about to become a director, person performing similar functions, or partner;

(4) every accountant, engineer, or appraiser, or any person whose profession gives authority to a statement made

by him, who has with his consent been named as having prepared or certified any part of the registration statement, or as having prepared or certified any report or valuation which is used in connection with the registration statement, with respect to the statement, in such registration statement, report, or valuation, which purports to have been prepared or certified by him;

(5) every underwriter with respect to such security.

If such person acquired the security after the issuer has made generally available to its security holders an earning statement covering a period of at least twelve months beginning after the effective date of the registration statement, then the right of recovery under this subsection shall be conditioned on proof that such person acquired the security relying upon such untrue statement in the registration statement or relying upon the registration statement and not knowing of such omission, but such reliance may be established without the proof of the reading of the registration statement by such person.

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(e) Measure of damages; undertaking for payment of costs. The suit authorized under subsection (a) may be to recover such damages as shall represent the difference between the amount paid for the security (not exceeding the price at which the security was offered to the public) and (1) the value thereof as of the time such suit was brought, or (2) the price at which such security shall have been disposed of in the market before suit, or (3) the price at which such security shall have been disposed of after suit but before judgment if such damages shall be less than the damages representing the difference between the amount paid for the security (not exceeding the price at which the security was offered to the public) and the value thereof as of the time such suit was brought: Provided, That if the defendant proves that any portion or all of such damages represents other than the

depreciation in value of such security resulting from such part of the registration statement, with respect to which his liability is asserted, not being true or omitting to state a material fact required to be stated therein or necessary to make the statements therein not misleading, such portion of or all such damages shall not be recoverable. * * *

15 U.S.C. § 78i(a)

§ 78i. Manipulation of security prices

(a) Transactions relating to purchase or sale of security. It shall be unlawful for any person, directly or indirectly, by the use of the mails or any means or instrumentality of interstate commerce, or of any facility of any national securities exchange, or for any member of a national securities exchange—

(1) For the purpose of creating a false or misleading appearance of active trading in any security registered on a national securities exchange, or a false or misleading appearance with respect to the market for any such security, (A) to effect any transaction in such security which involves no change in the beneficial owner thereof, or (B) to enter an order or orders for the purchase of such security with the knowledge that an order or orders of substantially the same size, at substantially the same time, and at substantially the same price, for the sale of any such security, has been or will be entered by or for the same or different parties, or (C) to enter any order or orders for the sale of any such security with the knowledge that an order or orders of substantially the same size, at substantially the same time, and at substantially the same price, for the purchase of such security, has been or will be entered by or for the same or different parties.

(2) To effect, alone or with one or more other persons, a series of transactions in any security registered on a national securities exchange or in connection with any security-based

swap agreement (as defined in section 206B of the Gramm-Leach-Bliley Act) with respect to such security creating actual or apparent active trading in such security, or raising or depressing the price of such security, for the purpose of inducing the purchase or sale of such security by others.

(3) If a dealer or broker, or other person selling or offering for sale or purchasing or offering to purchase the security or a security-based swap agreement (as defined in section 206B of the Gramm-Leach-Bliley Act) with respect to such security, to induce the purchase or sale of any security registered on a national securities exchange or any security-based swap agreement (as defined in section 206B of the Gramm-Leach-Bliley Act) with respect to such security by the circulation or dissemination in the ordinary course of business of information to the effect that the price of any such security will or is likely to rise or fall because of market operations of any one or more persons conducted for the purpose of raising or depressing the price of such security.

(4) If a dealer or broker, or the person selling or offering for sale or purchasing or offering to purchase the security or a security-based swap agreement (as defined in section 206B of the Gramm-Leach-Bliley Act) with respect to such security, to make, regarding any security registered on a national securities exchange or any security-based swap agreement (as defined in section 206B of the Gramm-Leach-Bliley Act) with respect to such security, for the purpose of inducing the purchase or sale of such security or such security-based swap agreement, any statement which was at the time and in the light of the circumstances under which it was made, false or misleading with respect to any material fact, and which he knew or had reasonable ground to believe was so false or misleading.

(5) For a consideration, received directly or indirectly from a dealer or broker, or other person selling or offering for

sale or purchasing or offering to purchase the security or a security-based swap agreement (as defined in section 206B of the Gramm-Leach-Bliley Act) with respect to such security, to induce the purchase of any security registered on a national securities exchange or any security-based swap agreement (as defined in section 206B of the Gramm-Leach-Bliley Act) with respect to such security by the circulation or dissemination of information to the effect that the price of any such security will or is likely to rise or fall because of market operations of any one or more persons conducted for the purpose of raising or depressing the price of such security.

(6) To effect either alone or with one or more other persons any series of transactions for the purchase and/or sale of any security registered on a national securities exchange for the purpose of pegging, fixing, or stabilizing the price of such security in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

15 U.S.C. § 78j(b)

§ 78j. Manipulative and deceptive devices

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange—

(b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, or any security-based swap agreement (as defined in section 206B of the Gramm-Leach-Bliley Act), any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors. * * *

15 U.S.C. § 78o-3(b)(9)

§ 78o-3. Registered securities associations

(b) Determinations by Commission requisite to registration of applicant as national securities association. An association of brokers and dealers shall not be registered as a national securities association unless the Commission determines that—

(9) The rules of the association do not impose any burden on competition not necessary or appropriate in furtherance of the purposes of this title.

15 U.S.C. § 78w(a)

§ 78w. Rules, regulations, and orders; annual reports

(a) Power to make rules and regulations; considerations; public disclosure.

(1) The Commission, the Board of Governors of the Federal Reserve System, and the other agencies enumerated in section 3(a)(34) of this title shall each have power to make such rules and regulations as may be necessary or appropriate to implement the provisions of this title for which they are responsible or for the execution of the functions vested in them by this title, and may for such purposes classify persons, securities, transactions, statements, applications, reports, and other matters within their respective jurisdictions, and prescribe greater, lesser, or different requirements for different classes thereof. No provision of this title imposing any liability shall apply to any act done or omitted in good faith in conformity with a rule, regulation, or order of the Commission, the Board of Governors of the Federal Reserve System, other agency enumerated in section 3(a)(34) of this title, or any self-regulatory organization, notwithstanding that such rule, regulation, or order may thereafter be amended or rescinded or determined by judicial or other authority to be invalid for any reason.

(2) The Commission and the Secretary of the Treasury, in making rules and regulations pursuant to any provisions of this title, shall consider among other matters the impact any such rule or regulation would have on competition. The Commission and the Secretary of the Treasury shall not adopt any such rule or regulation which would impose a burden on competition not necessary or appropriate in furtherance of the purposes of this title. The Commission and the Secretary of the Treasury shall include in the statement of basis and purpose incorporated in any rule or regulation adopted under this title, the reasons for the Commission's or the Secretary's determination that any burden on competition imposed by such rule or regulation is necessary or appropriate in furtherance of the purposes of this title.

70 Fed. Reg. 19672 (Apr. 13, 2005)

SECURITIES AND EXCHANGE COMMISSION

Release Nos. 33-8565; 34-51500; IC-26828;
File No. S7-03-05

Commission Guidance Regarding Prohibited Conduct in Connection with IPO Allocations

Effective Date: April 7, 2005

EXECUTIVE SUMMARY: The purpose of this release is to provide guidance under Regulation M with respect to the process known as book-building, including the process for allocating shares in initial public offerings ("IPOs"). The Commission recently brought three enforcement cases alleging abuses in the offering process in contravention of Regulation M. Based on these cases, the Commission seeks to highlight certain prohibited activities that underwriters should avoid during restricted periods. These include:

- Inducements to purchase in the form of tie-in agreements or other solicitations of aftermarket bids or purchases prior to the completion of the distribution.
- Communicating to customers that expressing an interest in buying shares in the immediate aftermarket ("aftermarket interest") or immediate aftermarket buying would help them obtain allocations of hot IPOs.
- Soliciting customers prior to the completion of the distribution regarding whether and at what price and in what quantity they intend to place immediate aftermarket orders for IPO stock.
- Proposing aftermarket prices to customers or encouraging customers who provide aftermarket

interest to increase the prices that they are willing to place orders in the immediate aftermarket.

- Accepting or seeking expressions of interest from customers that they intend to purchase an amount of shares in the aftermarket equal to the size of their IPO allocation ("1 for 1") or intend to bid for or purchase specific amounts of shares in the aftermarket that are pegged to the allocation amount without any reference to a fixed total position size.
- Soliciting aftermarket orders from customers before all IPO shares are distributed or rewarding customers for aftermarket orders by allocating additional IPO shares to such customers.
- Communicating to customers in connection with one offering that expressing an interest in the aftermarket or buying in the aftermarket would help them obtain IPO allocations of other hot IPOs.

SUPPLEMENTARY INFORMATION

I. Introduction

Solicitations or other attempts to induce aftermarket bids or purchases during a distribution undermine the integrity of the market as an independent pricing mechanism for the offered securities by giving purchasers the impression that there is a scarcity of the offered securities. This improper conduct by underwriters of IPOs erodes investor confidence in the capital raising process. In recognition of the serious adverse impact of these activities, the Commission has adopted rules, most recently embodied in Regulation M, which prohibit these activities as a prophylactic matter.[1]

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[1] Regulation M (17 CFR 242.100-105) generally prohibits inducements of any transactions other than those necessary to conduct the offering. In the context of IPOs, the prohibition is (cont'd)

Attempts to induce aftermarket bids or purchases during a Regulation M restricted period, or a cooling-off period as it was known under its predecessor, Rule 10b-6, have always been prohibited under these rules.[2] We first provided guidance under Rule 10b-6 concerning abusive practices in connection with IPO allocations in 1961.[3] In 2000, the Division of Market Regulation staff reminded underwriters that restricted period solicitations and tie-in agreements for aftermarket purchases are prohibited conduct under Regulation M.[4] Recent enforcement actions suggest that during the hot IPO market of the late 1990s and 2000, some underwriters and other market participants failed to comply

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(... cont'd)

generally discussed in terms of the "aftermarket," *i.e.*, trading after the distribution period is over. Regulation M is the successor to former Rules 10b-6, 10b-6A, 10b-7, 10b-8, and 10b-21, and includes the basic prohibitions of those rules. *See* Securities Exchange Act Release No. 38067 (December 20, 1996), 62 FR 520 (January 3, 1997) (Regulation M Adopting Release). Recently, the Commission published for comment proposed amendments to Regulation M. Securities Exchange Act Release No. 50831 (December 9, 2004), 69 FR 75774 (December 17, 2004) (Regulation M Proposing Release). *See infra* notes 6 and 11.

[2] Regulation M defines the term restricted period in Rule 100(b) (17 CFR 242.100(b)). *See infra* note 11.

[3] Securities Exchange Act Release No. 6536 (April 24, 1961) (stating that practice of distribution participants of IPOs making "allotments to their customers only if such customers agree to make comparable purchases in the open market after the issue is initially sold" violated Rule 10b-6).

[4] Staff Legal Bulletin No. 10, "Prohibited Solicitations and 'Tie-in' Agreements for Aftermarket Purchases," August 25, 2000

with Regulation M or previous guidance.[5] As a result, we find it appropriate to remind distribution participants and their affiliated purchasers that attempting to induce aftermarket bids or purchases during a restricted period violates Regulation M. Such guidance is necessary at this time to forestall improper conduct while continuing to promote legitimate underwriting practices that will facilitate capital formation.

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III. Regulation M and IPOs

A. "Hot" IPO Periods

In the context of an IPO, Regulation M's prohibition on attempts to induce bids and purchases focuses on impermissible conduct during the restricted period that could stimulate others to engage in transactions when the trading market in the newly issued securities first commences (*i.e.*, the "aftermarket"). "Hot" IPO markets present special problems in this context.[18] By definition, hot IPO markets are

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[5] *See SEC v. J.P. Morgan Securities, Inc.*, No. 1:03CV02028 (ESH) (Complaint) (October 1, 2003). *See also SEC v. Goldman Sachs Group, Inc.*, No. 05 SV 853 (SAS) (Complaint) (January 25, 2005); *SEC v. Morgan Stanley & Co., Inc.*, No. 1:05 CV 00166 (HHK) (Complaint) (January 25, 2005). In "hot" IPOs, investor demand significantly exceeds the supply of securities in the offering and the stock trades at a premium in the immediate aftermarket. See NYSE/NASD IPO Advisory Committee, Report and Recommendations (http://www.nasdr/com/pdf-text/ipo_report.pdf) (May 2003) (IPO Advisory Committee Report).

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[18] *See* IPO Advisory Committee Report at 1-2, stating:

> In recent years, however, public confidence in the integrity of the IPO process has eroded significantly. Investigations have revealed that certain underwriters and other participants in

(cont'd)

characterized by high levels of demand for an allocation of the IPO shares in the original distribution, and therefore the shares are a valuable commodity. Underwriters may therefore be tempted to demand, require, solicit, encourage, or otherwise attempt to induce investors to engage in immediate aftermarket transactions in order to obtain an allocation of IPO shares.[19] Such activity violates Regulation M and also may violate the general antifraud and anti-manipulation provisions of the securities laws.[20]

The Special Study in 1963 that focused on the "hot issue" market from 1959-1961[21] found that "[i]n the pricing of new issues, underwriters could not help but be influenced by the knowledge that the prices of many issues would subsequently rise in the immediate after-market . . . ."[22] The Special Study identified a number of problems and abuses that resulted

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(... cont'd)

> IPOs at times engaged in misconduct contrary to the best interests of investors and our markets . . . Instances of this behavior became more frequent during the IPO "bubble" of the late 1990s and 2000. . . .

[19] *See* IPO Advisory Committee Report at 1 (discussing underwriters' misconduct during the IPO "bubble" of the late 1990s and 2000).

[20] "Any transaction or any series of transactions, whether or not effected pursuant to the provisions of Regulation M . . . remain subject to the antifraud and antimanipulation provisions of the securities laws. . . ." 17 CFR 242.100(a).

[21] Special Study, pt. 1.

[22] Special Study, pt. 1, at 554. *See also* IPO Advisory Committee Report, similarly noting that during the late 1990s and 2000, the "large first-day price increases affected the allocation process by creating a pool of instant profits for underwriters to distribute." *Id.* at 1.

from this knowledge, including the solicitation of aftermarket purchases.[23] The Special Study found that, while it was often difficult to determine whether solicitation of purchases in the aftermarket occurred prior to or immediately following the effective date of the offering, customers of certain distribution participants engaged in significant market purchases on the first day of trading, thus suggesting that the participants actively solicited or recommended purchases at least as early as the notice of effectiveness.[24]

Subsequent studies also discussed underwriters' conduct in connection with IPOs.[25] We issued a report in 1984 analyzing the hot issue market from 1980-1983.[26] Among other things, the 1984 Report found that underwriters used "tie-in" arrangements requiring customers, as a condition of participation in a hot issue offering, either to agree to purchase additional shares of the same issue at a later time, or to participate in another offering.[27] Most recently, the

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[23] Special Study, pt. 1, at 520-21, 556. *See supra* note 14.

[24] Special Study, pt. 1, at 556 (also finding that "[t]o add to the aftermarket excitement, some managing underwriters arranged for solicitation of customers at premium prices through nonparticipating firms.") *See also* David Clurman, *Controlling a Hot Issue Market*, 56 Cornell L. Rev. 74, 76 (1970).

[25] *See, e.g.*, IPO Advisory Committee Report.

[26] "Report of the Securities and Exchange Commission Concerning Hot Issues Markets" (August 1984) (1984 Hot Issues Report).

[27] 1984 Hot Issues Report, at 37-39. "This practice stimulates demand for a hot issue in the aftermarket thereby facilitating the process by which stock prices rise to a premium." *Id.* at 37-38. We have stated that "making allotments to customers only if such customers agree to make some comparable purchase in the open market after the issue is initially sold" may violate the anti-manipulative provisions of the Securities Exchange Act of 1934 (Exchange Act), particularly Rule 10b-6 (which was replaced by (cont'd)

NYSE/NASD IPO Advisory Committee issued a report in May 2003 discussing underwriters' conduct during the IPO "bubble" of the late 1990s and 2000, a period in which there were an unusually large number of IPOs that traded "at extraordinary and immediate aftermarket premiums."[28] The report found that among the most harmful practices that artificially inflated aftermarket prices were "allocating IPO shares based on a potential investor's commitment to purchase additional shares in the aftermarket at specified prices," which the report referred to as "laddering."[29]

B. Book-Building

Book-building refers to the process by which underwriters gather and assess potential investor demand for an offering of securities and seek information important to their determination as to the size and pricing of an issue.[30] When used, the IPO book-building process begins with the filing of a registration statement with an initial estimated

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(... cont'd)

Rules 101 and 102 of Regulation M), and may violate other provisions of the federal securities laws. Securities Exchange Act Release No. 6536 (April 24, 1961).

[28] IPO Advisory Committee Report, at 1.

[29] IPO Advisory Committee Report, at 2. The Report described "laddering" as inducing investors to give orders to purchase shares in the aftermarket at pre-arranged, escalating prices in exchange for receiving IPO allocations, and stating that "[t]his conduct distorts the offering and the aftermarket and impairs investor confidence in the IPO process." *Id.* at 6.

[30] *See In re Initial Public Offering Securities Litigation*, 241 F. Supp. 2d 281, 388 n. 106 (S.D.N.Y. 2003) (book-building "entails the lead underwriter gathering and assessing potential investors' demand for the offering").

price range. Underwriters and the issuer then conduct "road shows" to market the offering to potential investors, generally institutions. The road shows provide investors, the issuer, and underwriters the opportunity to gather important information from each other. Investors seek information about a company, its management and its prospects, and underwriters seek information from investors that will assist them in determining particular investors' interest in the company, assessing demand for the offering, and improving pricing accuracy for the offering. Investors' demand for an offering necessarily depends on the value they place, and the value they expect the market to place, on the stock, both initially and in the future. In conjunction with the road shows, there are discussions between the underwriter's sales representatives and prospective investors to obtain investors' views about the issuer and the offered securities, and to obtain indications of the investors' interest in purchasing quantities of the underwritten securities in the offering at particular prices.[31] As the IPO Advisory Committee Report stated: "[C]ollecting information about investors' long-term interest in, and valuation of, a prospective issuer is an essential part of the book-building process."[32] By aggregating information obtained during this period from investors with other information, the underwriters and the issuer will agree on the size and pricing of the offering, and the underwriters will decide how to allocate the IPO shares to purchasers.[33]

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[31] *See* IPO Advisory Committee Report, at 5-6. Actual sales or contracts for sale are prohibited during the period prior to the registration statement for the offering becoming effective. 15 U.S.C. 77e.

[32] IPO Advisory Committee Report, at 6.

[33] *See* IPO Advisory Committee Report, at 4 (stating "[t]he pricing of an IPO is a business decision reached by the issuer in consultation with the underwriter"). *See also* Jay R. Ritter, *Initial*

(cont'd)

Information that underwriters typically attempt to gather from prospective investors during the book-building process for an IPO, whether in high demand or not, includes:[34]

- A customer's evaluation of the issuer's products, earnings, history, management, and prospects.
- A customer's valuation of the securities being offered.
- The amount of shares a customer seeks to purchase *in the offering* at particular price levels (*i.e.*, indications of interest or conditional offers to buy).
- Whether the customer owns similar securities in his portfolio.
- At what prices the customer expects the shares will trade after the offering is completed (*e.g.*, where the stock will be trading three to six months after the offering).
- Whether the customer intends to hold the securities as an investment (be a long-term holder), or, instead, expects to sell the shares in the immediate aftermarket (also known as "flipping").
- The customer's desired long-term future position in the security being offered or in the relevant industry, and the price or prices at which the customer might accumulate that position.

(... cont'd)

Public Offerings, Contemporary Finance Digest, Vol. 2, No. 1 (Spring 1998), pp. 5-30, at §7.1 at pp. 19-21.

[34] This is not an exhaustive list of all the information gathered during the book-building process.

C. The Application of Regulation M to Book-building Activities

While we recognize the importance of the book-building process in obtaining and assessing demand for an offering and in pricing the securities, we remind market participants that there is no "book-building exception" to Regulation M for inducing or attempting to induce aftermarket bids or purchases.[35] Although a distribution participant's obtaining and assessing information about demand for an offering during the book-building process would not, by itself, constitute an inducement or attempt to induce, accompanying conduct or communications, including one or more of the activities described below, may cause the collection of information to be part of conduct that violates Regulation M.

Underwriters and other distribution participants must take care that their activities do not cross the line into prohibited attempts to induce aftermarket bids or purchases by prospective investors or others. Regulation M's proscription of attempts to induce bids and purchases "covers activity that causes or is likely to cause another person to bid for or purchase covered securities."[36] The determination as to whether an activity or communication constitutes legitimate book-building or an attempt to induce a bid or purchase in violation of Regulation M depends on the particular facts and circumstances surrounding such activity or communication.

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[35] The exception in Rule 101(b)(9) of Regulation M for offers to sell or the solicitation of offers to buy the security being distributed does not extend to inducements or attempts to induce bids or purchases in the aftermarket while the distribution is occurring.

[36] Regulation M Concept Release, 59 FR at 21687.

D. Prohibited Attempts to Induce

As we previously stated, the purpose of this release is to provide guidance under Regulation M with respect to book-building and the process for allocating shares in IPOs. The activities we emphasize are prohibited do not represent an exhaustive list of conduct that violates Regulation M because the facts and circumstances of particular communications or activities will determine whether there is a Regulation M violation. This release is a reminder that certain conduct that causes or is likely to cause an undertaking, a promise, a commitment, or an understanding on the part of a customer to make aftermarket bids or purchases of an offered security, in relation to an expected allocation of IPO shares, is impermissible under Regulation M. We are not suggesting however that conduct is improper simply because it ascertains an investor's interest in purchasing an issuer's securities or leads to the development by an investor of an interest in purchasing securities of an issuer, whether in the offering or the aftermarket, including as a result of communications between the investor and a distribution participant regarding the issuer or the offering.

IV. Commission Guidance

The Commission has determined in the context of recent enforcement actions that the following activities and conduct during the Regulation M restricted period violated Regulation M:[37]

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[37] The Commission has recently brought enforcement cases alleging violations of Regulation M. *See SEC v. Morgan Stanley & Co.*, (Compl.) (2005); *SEC v. Goldman Sachs & Co.*, (Compl.) (2005); *SEC v. J.P. Morgan Securities, Inc.* (Compl.) (2003). *See also Michael J. Markowski*, *supra* note 16 and Securities Exchange Act Release No. 6536, *supra* note 3 (describing violations of Rule 10b-6, the predecessor to Regulation M).

1. *Inducements to purchase in the form of tie-in agreements*[38] *or other solicitations of aftermarket bids or purchases prior to the completion of the distribution.*

2. *Communicating to customers that expressing an interest in buying shares in the immediate aftermarket ("aftermarket interest") or immediate aftermarket buying would help them obtain allocations of hot IPOs.* The focus of this communication is clearly to attempt to induce customers to bid for or purchase securities in the immediate aftermarket in return for an allocation. However, inquiring as to customers' desired future position in the longer term (for example, three to six months) and the price or prices at which customers might accumulate that position, without reference to immediate aftermarket activity, does not, without more, fall within this violative conduct.

3. *Soliciting customers prior to the completion of the distribution regarding whether and at what price and in what quantity they intend to place immediate aftermarket orders for IPO stock.*[39] Where the sales representative

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[38] In this context, tie-in agreements are agreements or contracts for the purchase of shares in the aftermarket in exchange for an allocation. Such contracts may also violate the antifraud provisions of the Securities Act of 1933 (Securities Act) and the Exchange Act, and Section 5 of the Securities Act. *See* Special Study, pt. 1, at 521 n. 93. *See also* Staff Legal Bulletin No. 10. The solicitation of a tie-in is prohibited, irrespective of whether an agreement or contract to purchase results.

[39] We note that the district court in *In re Initial Public Offering Antitrust Litigation*, 287 F. Supp. 2d 497 (S.D.N.Y. Nov. 3, 2003), appeal pending, *Billing v. Credit Suisse First Boston*, Nos. 03-9284, 03-9288 (2d Cir.) stated that "inquiries of customers or others interested in purchasing Class Securities concerning the number of shares that such person would be willing to purchase in the aftermarket and the prices such person would be willing to pay for (cont'd)

inquires whether the customer intends to place orders in the immediate aftermarket, and if so, at what prices and quantities, the clear expectation and understanding is that the customer will submit aftermarket orders at the prices and quantities discussed if the customer receives an allocation of shares. However, inquiring as to a customer's desired future position in the longer term (for example, three to six months), and the price or prices at which the customer might accumulate that position without reference to immediate aftermarket activity, does not, without more, fall within this violative conduct. Soliciting aftermarket interest from customers that the distribution participant knows, or should know, have no interest in long-term holdings of the stock of IPO companies, may show that the firm or salesperson was attempting to induce aftermarket activity.

4. *Proposing aftermarket prices to customers or encouraging customers who provide aftermarket interest to increase the prices that they are willing to place orders in the immediate aftermarket.* Proposing aftermarket prices to customers creates the impression of a strong offering demand and a scarcity of offering shares, which can facilitate a distribution. Encouraging customers who provide aftermarket interest to increase the price level at which they were willing to place orders

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(... cont'd)

the shares" are actions that are "expressly permitted during the 'road show' period." *Id.* at 508. However, no provision of the federal securities laws expressly permits the conduct described in the quotations during the "road show" period. In fact, depending on the facts and circumstances, if the "road show" period overlaps with a restricted period defined in Regulation M, then such actions may represent attempts to induce aftermarket bids or purchases in violation of Rule 101 of Regulation M.

in the aftermarket conveys to customers that bidding for or purchasing in the immediate aftermarket at price levels higher than their own initial price level or higher than other customers' aftermarket price levels is expected in consideration for an allocation or an improved allocation in the IPO. Communication to customers of information obtained from third parties regarding their valuation of an issuer or the offering price is not violative where the conduct would not be likely to cause the customer to express an interest in paying a higher price in the immediate aftermarket. Encouraging an increase in prices, including by communication of prices of aftermarket interest of third parties would be viewed as improperly conveying to a customer that a commitment in the aftermarket at higher price levels is expected as described above.

5. *Accepting or seeking expressions of interest from customers that they intend to purchase an amount of shares in the aftermarket equal to the size of their IPO allocation ("1 for 1") or intend to bid for or purchase specific amounts of shares in the aftermarket that are pegged to the allocation amount without any reference to a fixed total position size.* By seeking this type of aftermarket interest from customers, the underwriter would be attempting to induce customers to place orders or buy in the aftermarket. In contrast, it is possible that a customer could express a desire to purchase in the aftermarket without prompting from the salesman. Where the customer's statement is spontaneous, there may be no "attempt to induce" by the salesperson. However, if, for example, there had been a prior course of dealing between the firm and the investor through which the firm communicated that the investor was expected to provide this type of aftermarket price and quantity information, the seemingly spontaneous statement of an intention to make aftermarket purchases may in fact have been

induced by the firm. In any event, whether or not the customer's statement is spontaneous, if a sales representative accepts a customer's offer to purchase shares in the immediate aftermarket that is expressly linked to the receipt of an allocation, this is a prohibited tie-in agreement and violates Regulation M.[40]

6. *Soliciting aftermarket orders from customers before all IPO shares are distributed or rewarding customers for aftermarket orders by allocating additional IPO shares to such customers.* If all of the IPO shares have not been distributed, an underwriter is still in a restricted period and prohibited from attempting to induce aftermarket activity.[41] By soliciting orders or rewarding customers

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[40] By accepting such a commitment, the firm also may violate Section 5 under the Securities Act. *See* Special Study, pt. 1, at 521 n 93. *See also* note 38 *supra*. In contrast, for example, where a sales representative rejects the offer to make aftermarket purchases linked to the receipt of an allocation, and informs the customer that firm policy prohibits allocations on that basis, the firm would not have engaged in activity that constitutes a prohibited tie-in agreement in violation of Regulation M, notwithstanding that the customer ultimately was allocated IPO shares.

[41] The definition of restricted period in Rule 100 of Regulation provides that a restricted period ends upon "such person's completion of participation in the distribution." In the Adopting Release the Commission stated, "[u]nder Regulation M, a person determines when its completion of participation in the distribution occurs based on the person's role in the distribution. An underwriter is deemed to have completed its participation in a distribution when its participation has been distributed . . . and after any stabilization arrangements and trading restrictions in connection with the distribution have been terminated. The definition contains a provision that an underwriter's participation is not deemed to be completed, however, if a syndicate overallotment option is exercised in an amount that exceeds the net syndicate short position at

(cont'd)

who place orders in the immediate aftermarket with additional IPO shares in the same offering, the underwriter is improperly stimulating aftermarket purchases during the restricted period.

7. *Communicating to customers in connection with one offering that expressing an interest in the aftermarket or buying in the aftermarket would help them obtain IPO allocations of other hot IPOs.* In this scenario, the broker would be inducing or attempting to induce aftermarket bids or purchases by linking an expectation of aftermarket bids or purchases to the customer's desire to receive allocations in future hot IPOs. However, determining that a customer is or may be a long-term investor in the securities of an issuer or one or more other issuers and communications with a customer in connection with that determination do not, in and of themselves, violate Regulation M, whether or not a customer engages in aftermarket bids or purchases.

Each of the above activities is an improper attempt to induce investors to bid for or purchase covered securities in the aftermarket in order to receive IPO allocations.[42] These solicitations or attempts to induce aimed at aftermarket transactions tend to: (1) create offering demand; (2) cause artificial aftermarket price escalation; and (3) erode market integrity. As we have stated before, when offerings are sold -

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(... cont'd)

the time of such exercise." Regulation M Adopting Release, 62 FR at 522.

[42] We note, however, that allocating offering shares in an amount less than the investor's indication of interest for shares in the offering in response to a solicitation to purchase in the offering would not, in and of itself, be considered an attempt to induce aftermarket purchases.

based upon an artificially manufactured perception of scarcity and priced on stimulated buying pressure, IPO investors are unable to evaluate the offering to determine that it has been appropriately priced.[43] Moreover, other investors who bid for or purchase shares in the aftermarket would not know that the aftermarket demand had been stimulated by the underwriters' unlawful conduct.

In addition, certain conduct occurring after the restricted period, while not of itself illegal, could be evidence that a distribution participant attempted during the restricted period to induce customers to bid for or purchase stock in the aftermarket.[44] Recent enforcement cases contain examples of such activity including: (1) follow-up solicitations for immediate aftermarket orders from customers who had provided aftermarket interest earlier; and (2) tracking or monitoring customers' aftermarket purchases to see whether they had followed through on their aftermarket interest.[45] We recognize that there are legitimate reasons to monitor customer activity.

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[43] *See* 1984 Hot Issue Report, at 37-39.

[44] As discussed above, while aftermarket transactions can serve as evidence that there had been an attempt to induce aftermarket bids or purchases, such evidence is not required to establish an attempt to induce in violation of Regulation M. Additionally, oral attempts to induce aftermarket activity can be evidenced in a variety of ways. *See, e.g., Americorp, Inc.*, Securities Exchange Act Release No. 41728 (August 11, 1999) (broker dealer representatives prepared order tickets for aftermarket orders prior to the IPO becoming effective).

[45] For example, the sales representative may call the investor when aftermarket trading begins and ask why an order had not been received from the investor; or the investor may be informed that he is being penalized for not making aftermarket purchases by being denied allocations in future IPOs.

However, tracking customer's aftermarket purchases in the first few days of trading following an IPO could be evidence supporting a claim that the customers' expressions of desire to purchase in the aftermarket were induced.

* * * * *

VI. General Request for Comment

We will continue to monitor developments in IPO allocation practices. We invite anyone who is interested to submit written comments on this release. Additionally, the Commission solicits comment generally concerning underwriter conduct in connection with IPOs and other distributions. The Commission will take these comments into consideration as it considers future rulemaking.

[This Interpretive Release became effective on April 7, 2005, and appears at 70 Fed. Reg. 19672 (Apr. 13, 2005)]

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No. 05-1157

IN THE

Supreme Court of the United States

CREDIT SUISSE SECURITIES (USA) LLC,
fka CREDIT SUISSE FIRST BOSTON LLC, *et al.*,

Petitioners,

v.

GLEN BILLING, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BILLING PLAINTIFFS' BRIEF ON THE MERITS

CHRISTOPHER LOVELL
Counsel of Record
GARY S. JACOBSON
LOVELL STEWART HALEBIAN LLP
500 Fifth Avenue
New York, New York 10110
(212) 608-1900

Counsel for Respondents
Glen Billing, et al.

(Additional Counsel listed on signature page)

207020

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

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QUESTIONS PRESENTED

1. Have defendants, at the FRCP Rule 12(b)(6) motion stage, carried their burden to establish that Congress intended in the federal securities laws to immunize from plaintiffs' antitrust claims defendants' private business decisions to collude where:

(a) Congress enacted the federal antitrust laws and the federal securities laws in order to prohibit defendants' conspiratorial conduct; and

(b) Congress expressly provided in the federal securities laws that private plaintiffs' claims thereunder "shall be in addition to any and all rights and remedies at law or equity" that plaintiffs have.

2. (a) In pleading conduct that is prohibited by both the antitrust laws and the securities laws, must plaintiffs anticipate and negate the assertion of the affirmative defense of implied immunity?

(b) For purposes of pleading an antitrust conspiracy, is conduct that is prohibited by the federal securities laws entitled to more protection than conduct that is protected by the First Amendment to the United States Constitution?

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Conley v. Gibson, 355 U.S. 41 (1957) ..... *passim*

Continental Ore Co. v. Union Carbide & Carbon Corp., 379 U.S. 690 (1962) 29

Cited Authorities

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Crawford-El v. Britton, 523 U.S. 574, 118 S. Ct. 1584 (1998) 26, 36

De Jonge v. Oregon, 299 U.S. 353 (1937) 28

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Eastman Kodak v. Image Technical Services, Inc., 504 U.S. 451 (1992) 33

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In re High Fructose Corn Syrup Antitrust Litig., 295 F.3d 651 (7th Cir. 2002) 30, 33, 35

Hughes Tool Co. v. Trans World Airlines, Inc., 409 U.S. 363 (1973) 7, 43

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In re Nasdaq Market-Makers Antitrust Litig., 894 F. Supp. 703 (S.D.N.Y. 1995) ..... *passim*

In re Nasdaq Market-Makers Antitrust Litig., 187 F.R.D. 465 (S.D.N.Y. 1998) 46

National Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Oklahoma, 468 U.S. 85 (1984) 41

National Gerimedical Hosp. & Gerontology Ctr. v. Blue Cross, 452 U.S. 378 (1981) ..... *passim*

Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 259 F.3d 154 (3d Cir. 2001) 47

Otter Tail Power Co. v. United States, 410 U.S. 366 (1973) 14, 19

Pinter v. Dahl, 486 U.S. 622 (1988) 9

Phonetele, Inc. v. American Tel. and Tel. Co., 664 F.2d 716 (9th Cir. 1981) 31

In re Public Offering Fee Antitrust Litig., 2004 WL 350696 (S.D.N.Y. Feb. 25, 2004) 45

Silver v. New York Stock Exchange, 373 U.S. 341 (1963) ..... *passim*

Simplot v. Strobl, 474 U.S. 1006 (1985) 47

In re Stock Exchs. Options Trading Antitrust Litig., 317 F.3d 134 (2d Cir. 2003) 3, 47

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Strobl v. New York Mercantile Exchange, 768 F.2d 22 (2d Cir. 1985) 34, 45, 47

Texaco, Inc. v. Dagher, 126 S. Ct. 1276 (2006) 40

Thill v. New York Stock Exchange, 633 F.2d 65 (7th Cir. 1980) 22

Thomas v. Independence Township, 463 F. 3d 285 (3d Cir. 2006) 27

Three Crown Ltd. P'ship v. Salomon Bros., Inc., 1995 WL 422467 (S.D.N.Y. July 14, 1995) 47

United Mine Workers v. Pennington, 381 U.S. 657 (1965) 27, 29

United States v. Alex Brown & Sons, Inc., 963 F. Supp. 235 (S.D.N.Y 1997) ..... *passim*

United States v. Borden Co., 308 U.S. 188 (1939) ... 20

United States v. Morgan, 118 F.Supp. 621 (S.D.N.Y. 1953) 45

United States v. National Ass'n of Securities Dealers, 422 U.S. 694 (1975) ..... *passim*

United States v. Patten, 226 U.S. 525 (1913) 45

United States v. Philadelphia National Bank, 374 U.S. 321 (1963) 13, 20

Cited Authorities

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United States v. Salomon Bros., Inc., 57 Fed. Reg. 29,743 (1992) 47

United States v. Steinhardt Management Co. & Caxton Corp., 1995 WL 322772 (S.D.N.Y. May 5, 1995) 45

United States v. Topco Associates, Inc., 405 U.S. 596 (1972) 12, 37

Verizon Communications v. Law Offices of Curtis V. Trinko, 540 U.S. 398 (2004) 8, 12, 37, 38

Xechem, Inc. v. Bristol-Myers Squibb Co., 372 F.3d 899 (7th Cir. 2004) 26

Federal Statutes, Regulations, Rules

15 U.S.C. § 1 ..... *passim*

15 U.S.C. § 77(a) ..... *passim*

15 U.S.C. § 77p(a) 7

15 U.S.C. § 78bb(a) 7, 18

15 U.S.C. § 78bb(f)(1)(A) 7, 19

Fed. R. Civ. P. 12(b)(6) ..... *passim*

Cited Authorities

Page

Miscellaneous

Phillip Areeda & Herbert Hovenkamp, ANTITRUST LAW, (2d ed. 2003) 29, 38, 40

Calkins, *An Enforcement Official's Reflections on the Antitrust Class Actions*, 39 ARIZ. L. REV. 413 (1977) 46

Congressman John Dingell letter to the Attorney General and the Chairman of the SEC (Nov. 19, 1998) 7, 9, 19

William Christie & Paul Schultz, *Why Do NASDAQ Market Makers Avoid Odd-Eighth Quotes?*. 49 J. FIN. 1813 (1994) 47

Kaplan, *Antitrust As A Public-Private Partnership: A Case Study Of The Nasdaq Investigation*, 52 CASE WESTERN RESERVE L. REV. 111 (1999) 46

Statement of Rep. Markey (Oct. 5, 1993) 19

Statement of Jerome H. Powell, Assistant Secretary for Domestic Finance, Department of the Treasury, Salomon Bros. and Government Securities: *Hearings Before the House Comm. On Energy and Commerce*, 102nd Cong. 110 (Sept. 4, 1991) 9, 19

George Stigler, THE THEORY OF ECONOMIC REGULATION 48

Cited Authorities

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In the Matter of Certain Market Making Activities on the NASDAQ, Exchange Act Release No. 34-40900, 1998 WL 919673 (Jan 11, 1999) 47

In the Matter of National Association of Securities Dealers, Inc., Order Instituting Public Proceedings Pursuant to Section 19(h)(1) of the Securities Exchange Act of 1934, Making Findings and Imposing Remedial Sanctions, 1996 WL 447193 (S.E.C. Aug. 8, 1996) 48

S.E.C. Release No. 33-8851, (Dec. 9, 2004) 4

S. Rep. 73-792, 1934 WL 1289 18

STATEMENT OF THE CASE

A. Plaintiffs allege that, in violation of Section 1 of the Sherman Antitrust Act ("Sherman Act"), 15 U.S.C. §1, the ten leading investment banks ("defendants")[1] made the private business decision to conspire as follows.

Defendants agreed to require customers to provide pools of orders to inflate aftermarket prices of Class Securities above their IPO prices by purchasing those securities immediately after the IPO at "laddered" or escalating prices. Defendants, at times, jointly negotiated with customers the amount of laddering orders they required. C ¶ 57; JA 29. Defendants jointly discussed amongst themselves the amount of laddering orders that would be required and the increase in securities prices. C ¶ 55; JA 28.

As a result of these pools of laddered orders, defendants were able to greatly inflate aftermarket prices above the IPO prices. C ¶ 8; JA13-14. The inflation was so large that, in aggregate and on average, it was 8.5 **times** as much as existed during the 1981-1996 pre-conspiracy period. *Id.*

In order to cash in on the unprecedented price inflation, defendants further agreed to impose an additional charge for their underwriting of Class Securities. C ¶¶ 1, 4(a) 6; JA 11, 12. This charge, in essence, was a kickback to defendants of portions of customers' profits made by purchasing IPO shares at the IPO price and then quickly re-selling such securities at the inflated aftermarket prices. *Id.*

Thus, plaintiffs allege that the ten largest investment banks conspired to require from customers tie-in consideration (the "anti-competitive charges") for allocations of shares of Class Securities and to inflate the aftermarket

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1. The named defendants were the dominant underwriters of certain types of initial public offerings ("IPO") *e.g.*, technology companies that raise $20,000,000 or more in their IPO ("Class Securities"). Amended Complaint ("C") ¶¶ 1, 4(b), 7; C ¶ 1, 8; Joint Appendix ("JA") JA 11-13.

prices of those securities above the IPO price.[2] C ¶¶ 1, 4, 7; JA 11, 13.

All plaintiffs paid the inflated prices caused by defendants' conspiracy. C ¶ 13; JA 16-19. Many plaintiffs paid those prices directly to defendants. *Id.* Defendants' collusive behavior inflated their revenues, individually and collectively, by billions of dollars at the expense of plaintiffs and the proposed class. C ¶¶ 7-8; JA 13-14.

Since the filing of plaintiffs' complaint, many administrative claims have been made against and settled by various defendants relating to the foregoing types of conduct. *E.g.*, Petition Appendix ("Pet. App.") 2a, 116a-119a. Because this conduct is unlawful under the securities laws if engaged in individually, none of these findings has needed to consider collusion. None of these or any other proceedings has provided any recompense to investors who lost billions of dollars of capital allegedly due to defendants' collusive conduct.

B. Pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, defendants moved to dismiss plaintiffs' complaint based, among other things, on the affirmative defense that defendants' alleged conspiracy is impliedly immunized from antitrust claims by the federal securities laws.

The District Court held that implied immunity was an affirmative defense but dismissed plaintiffs' claims on this ground. The Court of Appeals for the Second Circuit vacated the dismissal and remanded. *See* Pet. App. 1a-71a ("Decision").

Defendants petitioned the Court for rehearing and rehearing *en banc*. Pet. App. 123a. They relied on two then-recent

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2. In an "underwriting," investment banks typically purchase from an issuer its initial public offering of stock at a price agreed upon with the issuer. The underwriters also agree with the issuer: (a) to charge an agreed-upon underwriters' discount representing the underwriters' disclosed compensation, and (b) to offer the entire issue of stock to the public at the sum of (1) the agreed-upon purchase price paid to the issuer, plus (2) the agreed-upon underwriters' discount and commission. This sum is the "IPO price." C ¶ 36; JA 24.

decisions of the Second Circuit Court of Appeals that had unanimously upheld immunity for these same defendants in connection with very different facts involving underwritings and stock options listings and executions. *In re Stock Exchange Options Trading Antitrust Litig.*, 317 F.3d 134 (2d Cir. 2003); *Friedman v. Salomon/Smith Barney, Inc.*, 313 F.3d 796 (2d Cir. 2002).

Not one Judge of the Second Circuit voted for rehearing of the Decision or even for plaintiffs to respond to defendants' petition. Pet. App. 123a. That Court is located a few blocks from Wall Street and has repeatedly granted Wall Street antitrust immunity when such was consistent with this Court's precedent. But it found no merit to defendants' immunity arguments concerning the specific conduct here.

C. The detailed seventy-one page Decision confronted essentially three issues:

Issue #1: What is the status, under the federal securities laws, of a conspiracy among underwriters to require laddering orders to manipulate prices and kickback tie-in agreements in order to profit from inflated prices?

a. The Decision Held That The Challenged Conduct Has Always Been Unlawful Under The Securities Laws

The Court of Appeals found that plaintiffs had alleged an "epic conspiracy" by underwriters to inflate their underwriting charges and prices by agreeing to require laddering orders and tie-ins. Pet. App. 1a-3a. ("Plaintiffs tell a compelling story and are not the first to tell it").

Such laddering and kickback tie-in agreements are, the Court of Appeals held, prohibited under the federal securities laws. *E.g.*, Pet. App. 6a-16a, 62a-66a, 70a.

b. The SEC Agreed

The Securities and Exchange Commission ("SEC") has agreed, unanimously stating as follows:

> The **Commission has long considered** tying the award of allocations of offered shares to

> additional consideration to be fraudulent and manipulative, and **such practices have always been actionable under Section 17(a)** of the Securities Act [of 1933] . . .

(emphasis supplied). 2004 Proposed Amendment, 69 Fed. Reg. at 75,783 SEC Release 33-8851 (Dec. 9, 2004)("Release") at p. 15 *quoted* at Decision, Pet. App. 66a-67a.

Similarly, in response to questions by the Court of Appeals, the SEC stated:

> [t]he federal securities laws and the Commission's regulations generally prohibit market manipulation, including the types of tie-in and laddering agreements alleged in the complaints in these actions.

Pet. App. 188a-189a; *see* "d" below (defendants' challenged conduct is also prohibited by (Sections 9(a)(2) and 15 of the Securities Exchange Act, 15 U.S.C. §§ 78i(a)(2) and 78o).

c. The United States Agrees

Also in response to the Court of Appeals' questions, the Department of Justice ("DOJ"), stating that it was speaking on behalf of the United States, responded as follows:

> There is no dispute, however, that the securities laws and SEC regulations have long prohibited tying and laddering because of the serious threats such practices pose both to competition and to the proper functioning of the securities markets.

Pet App. 201a. The United States continues to take this position. Brief for the United States as Amicus Curiae Supporting Vacatur ("U.S. Brief") at 22-23 & n. 8.

Defendants argue that their deleterious conduct may be prohibited under the securities laws but is subject to on-going SEC line-drawing. Brief for Petitioners ("Brief") 14-15, 27-33.

Issue #2: Under the implied antitrust immunity precedent of this Court, is such a conspiracy to require laddering and tie-ins immunized by the securities laws from plaintiffs' antitrust claims?

d. The Decision Found And The United States Agrees That Neither "Plain Repugnancy" Nor "Displacement" Immunity Is Present

The Decision found that, in prior cases in which the affirmative defense of implied immunity was raised, this Court has required that defendants show either (a) "plain repugnancy" between the antitrust and securities laws with respect to the challenged conduct (Pet. App. 23a and 56a); or (b) "regulation of the challenged conduct that is so pervasive" that it ousts or displaces the antirust laws altogether. Pet App. 67a-70a.

The Decision found that neither form of implied immunity was present with respect to the challenged conduct here. Pet App. 62a-69a.

The United States also continues unequivocally to reject defendants' position that the securities laws oust the antitrust laws altogether. U.S. Brief at 8. Likewise, the United States continues to endorse the "repugnancy" immunity standard it argued to the Second Circuit: the "principal question [in implying immunity] is whether the conduct alleged in the complaint was 'expressly or implicitly approved by the securities laws or SEC regulations.'" U.S. Brief at 6, *quoting* Pet. App. 207a.

Here, the challenged conduct has never been expressly or implicitly approved and, on the contrary, has always been prohibited under the federal securities. Pet. App. 8a-16a, 64a-70a. Therefore, as the United States (now including the SEC) asserts, a conspiracy to require laddering and tie-ins is non-immunized conduct that is prohibited by the antitrust as well as the securities laws. U.S. Brief pp. 6-7, 22.

Defendants have not even attempted to meet their burden here by saying that they satisfy the implied antitrust immunity standard set forth in the Decision nor the substantive (non-pleading) immunity standard proposed by the United States. Brief *passim*. If this Court upholds the Decision's immunity test, as we believe it should, or the United States' substantive immunity test, then defendants' dismissal arguments fail.

Issue #3: What is the effect, if any, on the foregoing implied immunity analysis of plaintiffs' allegations that defendants abused their interactions during their joint venture underwriting syndicates by agreeing to require laddering orders to manipulate prices and tie-in agreements to profit from price increases?

The Decision found no relevance to the implied immunity test of the body of evidence to be used to prove the challenged conduct. Pet. App. 61a n. 47 (advising the District Court of its flexibility to exclude or admit each item of evidence, give limiting instructions, etc.).

The United States disagrees. It proposes a novel antitrust immunity pleading standard. For purposes of pleading antitrust violations, this standard would afford more protection to conduct that is prohibited by the federal securities laws than to conduct that is protected by the First Amendment to the U.S. Constitution. U.S. Brief at 9, 14-16. The United States proposes remand so that plaintiffs may re-plead to satisfy the novel standard. U.S. Brief at 27, 30.

Defendants disagree with the Decision and the United States. Defendants oppose any leave to amend. Brief at 49 n. 6.

SUMMARY OF ARGUMENT

A. The Decision determined that, if this Court's well-established immunity standards are applied to **the challenged conduct here** in the same way that those standards have been applied to the challenged conduct present in prior cases, then defendants' conduct is not entitled to immunity from the antitrust laws. *See* Argument Point I *infra*.

The United States and, unlike in *Gordon v. New York Stock Exchange, Inc.*, 422 U.S. 659, 682 (1975) ("*Gordon*"), the SEC, both agree that, under this Court's well-established immunity standard, there is no immunity for the challenged conduct of a conspiracy of underwriters to require laddering and kickback tie-ins.

Congress has been well aware of the beneficial effects of prior antitrust prosecutions in the securities markets. These effects include saving investors billions of dollars, and

uncovering or prosecuting deleterious conduct that had gone unprosecuted. *See, e.g.*, November 19, 1998 Congressman John Dingell letter to the Attorney General and the Chairman of the SEC ("[W]here was the SEC? Why did the SEC allow things to deteriorate so badly?") ("Dingell"), available at *http://energycommerce.house.gov/comdem/press/105ltr99.htm.*

Thus, at the same time that Congress has abolished certain non-securities claims, it has continued its express preservations of any and all other claims, which include antitrust claims. *Compare* 15 U.S.C. § 78bb(f)(1)(A) (Securities Litigation Uniform Standards Act ("SLUSA") *with* 15 U.S.C. §§ 77p(a) and 78bb(a) (savings clauses).

Consistent with Congress' continued preservation of antitrust claims, this Court expressly held in *Silver v. New York Stock Exchange*, 373 U.S. 341, 357 (1963) that antitrust immunity may be implied "only if necessary to make the Securities Exchange Act work". It is not "necessary to make the Exchange Act work" to license or immunize from antitrust prosecution an underwriter conspiracy to require laddering and tie-ins.

On the contrary, such conduct violates important prohibitions of the securities laws and contravenes their fundamental purposes (a) to protect investors against a loss of capital from such prohibited practices, (b) to provide remedies under the securities laws, and (c) to preserve remedies under other laws. *See* Securities Act § 17(a), 15 U.S.C. § 77p(a); Securities Exchange Act § 28(a), 15 U.S.C. § 78bb(a). *See Hughes Tool Co. v. Trans World Airlines, Inc.*, 409 U.S. 363, 410 (1973) (Private Sherman Act antitrust action should proceed regardless of the Civil Aeronautics Board's involvement since the context of the Federal Aviation Act explicitly states "Nothing contained in this chapter shall in any way abridge nor alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies." Federal Aviation Act of 1958– 49 U.S.C. § 1506, recodified at 49 U.S.C.A. § 40120(c).)

Thus, as the United States (including the still-understaffed SEC) recognizes, the Securities Exchange Act will work **better** and Congress' purposes therein will be better achieved when antitrust claims "reach" and prosecute the deleterious, doubly-prohibited collusive conduct at issue here. *Compare* U.S. Brief at p. 22 *with* Securities Act § 9(a), 15 U.S.C. § 77i(a).

B. Defendants have the movants' burden on their FRCP Rule 12(b)(6) motion to demonstrate that, accepting plaintiffs' well-pled allegations as true and drawing all reasonable inferences in favor of plaintiffs, plaintiffs can prove no set of facts constituting a non-immunized antitrust claim. *See* Point II, *infra*.

Defendants have failed to make their case for any, let alone all, of their proposed changes in the immunity standard and the fact and law determinations here. If accepted, such changes would dangerously alter this Court's well-established immunity standard in at least two ways.

First, implied immunity could, for the first time, be justified because an evil is so deleterious that Congress prohibits it in two federal statutes and the regulator supplements the second prohibition with further prohibitions.

Second, more generally, the "Magna Carta" of American economic freedom, *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko*, 540 U.S. 398, 415 (2004), could be dissolved for a broad part of American commerce, *i.e.*, whenever active regulation is present. These changes would stand this Court's wise precedent on its head and, for example, end decades of salutary consequences for the securities markets arising from the applications of the antitrust laws to the securities markets under such precedent. *See* Pt. IV, *infra*. For this very reason, it may be inferred, Congress expressly preserves in the securities laws claims such as plaintiffs' antitrust claims.

In the latter regard, although defendants' policy arguments are not properly addressed to this forum, antitrust and restraint of trade claims have been repeatedly prosecuted to beneficial effect for two hundred years against deleterious conduct in the securities markets. Point IV, D, *infra*.

In its on-going oversight of the SEC, Congress has repeatedly recognized the beneficial aspects and incentives, checks and balances of having antitrust claims prosecuted. *See Dingell, supra*; October 5, 1993 statement of Rep. Markey (broad-ranging government investigations into **antitrust** violations and market manipulations demonstrated need for comprehensive reform of securities markets);[3] Sept. 4, 1991 Statement of Jerome H. Powell, Assistant Secretary for Domestic Finance, Department of the Treasury, Salomon Bros. and Government Securities: *Hearings Before the House Comm. On Energy and Commerce*, 102nd Cong. 110 (1991) ("Securities fraud and antitrust violations are more generally the enforcement responsibility of the self-regulatory regulations, the SEC and the Justice Department").

C. The new pleading standard of the United States wholly ignores the most important purposes of the federal securities laws, investor protection, and greatly elevates a lesser purpose[4], capital formation. *Pinter v. Dahl*, 486 U.S. 622, 653, 108 S.Ct. 2063, 2081-82, 100 L.Ed.2d 658 (1988) (courts should apply the securities laws flexibly to achieve the goal of investor protection). *See* Pet. App. 20a, n. 18.

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3. The statement is available at *http://thomas.loc.gov/cgi-bin/query/F?r103:5:./temp/~r103zFvqf3:e41375*.

4. Section 2(b) of the Securities Act provides:

> CONSIDERATION OF PROMOTION OF EFFICIENCY, COMPETITION, AND
>
> CAPITAL FORMATION –
>
> Whenever pursuant to this title the Commission is engaged in rulemaking and is required to consider or determine whether an action is necessary or appropriate in the public interest, the Commission shall also consider, in addition to the protection of investors, whether the action will promote efficiency, competition, and capital formation.

Securities Act § 2(b) (as amended by the National Securities Market Improvement Act of 1996 ("NSMIA"), Pub. L. No. 104-290, § 106(a), 110 Stat. 3416, 3424) (codified at 15 U.S.C. § 77b(b)).

Pursuant to Congress' investor protection purposes, joint action to raise prices above the IPO price is expressly prohibited, not permitted. *Sec* Pet. App. 12a-13a (SEC says Section 9a of Exchange Act is "heart" of Act). Plaintiffs allege that defendants "abused" their permitted meetings in order to engage in conduct prohibited by the heart of the securities laws. Under *Conley v. Gibson*, 355 U.S. 41 (1957), this allegation is to be accepted as true.

Given that "abuse" and unlawful conduct under the securities laws is what plaintiffs are alleging, the investor protection purposes dictate the opposite approach from that of the United States. In that, proper approach, defendants' syndicate activities alleged in the Complaint are fair game for antitrust conspiracy inferences to the extent the activities are unlawful under the federal securities laws because defendants "abused" (C ¶ 5A,116) such activities to require laddering to inflate prices and tie-ins to profit from price increases.

Further, the United States' pleading standard is contrary to this Court's affirmative defense, as well as its antitrust immunity, and antitrust evidence precedent. Arg. III, *infra.* Such novel standard provides more pleading protection to conduct that is prohibited by the federal securities laws than this Court's *Noerr-Pennington* doctrine provides to conduct that is protected by the First Amendment to the U.S. Constitution. *See* Arg, Pt. III; *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961); *United Mine Workers v. Pennington*, 381 U.S. 657 (1965).

STATEMENT OF FACTS

The anticompetitive effects of defendants' "epic" conspiracy included (1) causing customers to have to pay to the defendant banks an additional tie-in charge to obtain certain IPO shares (C ¶¶ 1, 70; JA 11, 32); (2) penalizing and forcing other underwriters to impose such extra charge and to abide by the dominant investment banks' agreement (C ¶ 58; JA 29); and (3) enabling defendants to increase their market share from 71% to 90% during the Class Period. C ¶ 38; JA 25.

Another intended anticompetitive effect of the alleged conspiracy was to place in defendants' hands pools of customer aftermarket orders to buy at escalating, "laddered" prices above the IPO price in each of the eight hundred-plus IPOs at issue here. C ¶ 4(b), 7; JA 12, 13. With these pools of buy orders, defendants' alleged conspiracy raised the aftermarket price spectacularly above the IPO price. C ¶ 8; JA 13.

For example, in the market existing before defendants' conspiracy from 1981 until 1996, the average price increase (sometimes called the "pop") on the first day of trading of equity IPOs was approximately **8%**. As the direct result and cumulative effect of Defendants' implementation of their anticompetitive agreement, the average price increase on the first day of trading in Class Securities during the Class Period, was in excess of **60%** and during 1999-2000, was in excess of **70%**. C ¶ 8; JA 13.

This increase of 8.5 times the non-conspiratorial first day "pop", benefited defendants enormously. The more that defendants' "epic" conspiracy could use these pools of laddered orders to raise the aftermarket prices **above the IPO price**, the greater the anticompetitive, tie-in charge defendants' conspiracy could extract from customers. C ¶¶ 42, 73, 74; JA 26, 32, 33.

Necessity and Motive To Conspire. Due to the nature and operations of a public exchange market, defendants had to and did "restrain" and inflate the prices of not just their transactions with their own customers. Defendants also had to inflate the prices of **all** transactions in the aftermarket for Class Securities in order to increase their conspiratorial charges and total kickback income. C ¶¶ 1, 43, 71; JA 11, 26, 32.

Only through their unlawful agreement were defendants able to combine their market power to exert sufficient influence to inflate all aftermarket prices of Class Securities, on average, 8.5 times as much as during the pre-conspiracy period. C ¶¶ 42-43, 47; JA 26, 27.

With full knowledge of the foregoing, defendants took the steps discussed in Point III B, *infra*.

Finally, though not necessary to sustain their conspiracy allegations, plaintiffs also allege that defendants had and "abused" (C ¶ 5) the "opportunity to make and manage their unlawful agreement" during defendants' frequent meetings and communications in connection with their underwriting syndicates. C ¶¶ 44, 44-54 generally; JA 25-27.

ARGUMENT

POINT I. Plaintiffs Satisfy The Correct Application Of This Court's Implied Immuity Test Set Forth By The Court Of Appeals

A. This Court's Standards For Implied Immunity

1. The Antitrust Laws Are The Magna Carta Of Free Enterprise And The Fundamental Commercial Legislation Of The United States

The "Sherman Act is, indeed, the Magna Carta of free enterprise". *Trinko*, 540 U.S. at 415, *citing* to *United States v. Topco Associates, Inc.*, 405 U.S. 596, 610 (1972) (*"Topco"*); *accord*, U.S. Brief at 1.

The antitrust laws "are as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of the fundamental personal freedoms." *Topco*, 405 U.S. 610; *see also Community Communications Co., Inc. v. City of Boulder*, 455 U.S. 40, 56 n. 19 (1982); *California Retail Liquor Dealers Ass'n*, 445 U.S. 97, 110-11 (1980).

2. Implied Repeal Of The Antitrust Laws Is Strongly Disfavored, And Will Be Found Only Upon A "Convincing Showing Of Plain Repugnancy" Between The Antitrust Laws And The Subsequent Statute With Respect To The Challenged Conduct

Express "exemptions from antitrust laws are strictly construed," *FMC v. Seatrain Lines, Inc.*, 411 U.S. 726, 733 (1973), and implied repeals of antitrust laws are "strongly

disfavored." *United States v. Philadelphia National Bank*, 374 U.S. 321, 350-351, 372 (1963) (antitrust laws seek to further "our fundamental national economic policy" of competition).

Antitrust immunity will be implied only upon a "convincing showing of plain repugnancy" between the antitrust laws and the subsequent statute. *Id. United States v. National Ass'n of Securities Dealers*, 422 U.S. 694, 720 (1975) ("*NASD*") ("convincing showing of plain repugnancy"); *Gordon v. New York Stock Exchange, Inc.*, 422 U.S. 659, 682 (1975) ("*Gordon*"); *Silver v. New York Stock Exchange*, 373 U.S. 341, 357 (1963) ("*Silver*").

3. Even Where Plain Repugnancy Is Convincingly Shown, Immunity Will Be Implied Only To "The Minimum Extent Necessary" To Make The Subsequent Legislation Work

Even where "a convincing showing of plain repugnancy" has been made, immunity will be implied "only to the minimum extent necessary" to make the subsequent statute's regulatory scheme work. *National Gerimedical Hosp. & Gerontology Center v. Blue Cross*, 452 U.S. 378, 389 (1981); *Gordon*, 422 U.S. at 683-684; *Silver*, 373 U.S. at 357.

The objective is to reconcile "the operation of both statutory schemes rather than holding one completely ousted." *National Gerimedical*, 452 U.S. at 392; *accord* U.S. Brief at 1.

4. The Decision Faithfully Followed This Court's Well-Established Standards, Whereas Defendants Ignore Them

This Court's foregoing standards and precedent were faithfully quoted and followed by the Second Circuit in the opinion below. *E.g.*, Pet. App. 23a. In contrast, defendants do not mention the "to the minimum extent necessary", "implied repeal is disfavored", and "reconcile the operation of both statutes" aspects of this Court's immunity test. Brief, *passim*.

B. The Decision Correctly Described What "Convincing Showing Of Plain Repugnancy" Has Meant And Has Not Meant In This Court's Prior Applications Of Its Implied Immunity Standard

The Decision analyzed this Court's prior immunity decisions in great detail. Pet. App. 23a-41a. The Court of Appeals then reviewed its own extensive decisions in the area. *Id.* 42a-56a ("arduous" review of the law). The Court then described various aspects of the precedent:

(a) The case for implied immunity is weakest where, as here, private decision-making creates profit-oriented collusive conduct. *National Gerimedical*, 452 U.S. at 390; *Otter Tail Power Co. v. United States*, 410 U.S. 366, 374 (1973).

(b) Mere extensive regulation, standing alone, does not justify implied antitrust immunity. *Id.*

(c) This Court's application of its "convincing showing of plain repugnancy" test for antitrust immunity has, in previous cases, required either

(i) that Congress mandated or approved in the regulatory statute the challenged conduct that was prohibited by the antitrust laws,

(ii) that Congress empowered the regulatory agency to mandate or approve the conduct that the plaintiff challenged **and** the agency **did** act to mandate or approve such conduct. (Pet. App. 32a) and

(iii) evidence of intent to repeal or immunize is present. Pet. App. 47a.

The Decision then applied this Court's "plain repugnancy" standard of antitrust immunity through the following:

(1) have the movants identified a potential conflict between the antirust laws and the securities law **with respect to the challenged conduct** (Pet. App 64a); and

(2) if so, have the movants pointed to any evidence that Congress intended to repeal the antirust laws with respect to

the challenged conduct? *National Gerimedical*, 452 U.S. at 389 ("To be sure, where Congress did intend to repeal the antitrust laws, that intent governs, but this intent must be clear."). *E.g.*:

> That determination [whether to imply immunity] is informed by considering (1) congressional intent as reflected in legislative history and a statute's structure; (2) the possibility for conflicting mandates; (3) the possibility that application of the antitrust laws would moot a regulatory provision; (4) the history of agency regulation of the anticompetitive conduct; and (5) any other evidence indicating that the statute implies a repeal. The mere power to 'permit' an act as not violating a regulatory mandate does not alone immunize that act.

Pet. App. 47a (footnote and citations omitted). The Court of Appeals found that the foregoing conditions were not satisfied as to defendants' private business decision allegedly to conspire to require laddering orders to inflate prices and require kick backs of the profits from inflated prices. Pet. App. 64a-71a.

1. The Relationship Of The Securities And Antitrust Laws With Respect To The Conduct At Issue In *Gordon* And *NASD* Is The Polar Opposite Of That Here

In coming to its conclusion, the Decision painstakingly analyzed *Gordon* and *NASD*. Pet. App. 30a-41a. It determined that the relationship between the federal securities and antitrust laws with respect to the conduct at issue in *Gordon* and *NASD* was the polar opposite of that here. Pet. App. 70a ("The claim of implied immunity in this case is, in many ways, unlike any we have seen.").

For example, the intended approval in the legislative history, the express authorization in the statute, and the subsequent regulatory authorization of the specific conduct at issue in *Gordon* (Pet. App. 31a-34a) and *NASD* (*id.* 36a-41a) are all the polar opposite of the intended **dis**approval, the statutory

prohibition and the subsequent consistent prosecution and prevention of the specific conduct at issue here.

In order to protect investors from the loss of their capital, Congress (a) statutorily prohibited the conduct here through Section 17 of the Securities Act, Section 9(a)(2) of the Exchange Act (the "heart" of that Act), Section 15o(c)-1 of the Exchange Act and other sections of the federal securities laws; (b) provided express remedies to investors therefor (*e.g.*, Section 9(a)(2) of the Exchange Act); and (c) preserved any and all "rights and remedies" of investors under non-securities laws. (Neither *Gordon*, *NASD*, *Friedman* nor *Exchange Options* consider the statutory preservation of claims.) The SEC, the United States and private investors have prosecuted this evil and it has been continuously prohibited since enactment.

In *Gordon*, unlike here, the type of conduct at issue did not cause or contribute to the stock market crash of 1929 or the Great Depression. On the contrary, in the legislative history, Congress found that the setting of commissions rates by exchange rule was benign and commonplace. Congress expressly authorized the SEC to approve (or disapprove) exchange rates fixing rates. 422 U.S. at 689. The SEC exercised this express authority and approved the exchange's rules fixing the rates. The brokers undertook the benign conduct of complying with the exchange rule.

In direct conflict with congressionally authorized SEC approval, civil plaintiffs sued two brokers and the exchange claiming that they conspired to fix rates. 422 U.S. at 691. This direct conflict with the securities laws' historical treatment of the conduct at issue and the other circumstances present, created a convincing showing of plain repugnancy between the securities laws and the antitrust laws with respect to such conduct. This repugnancy would have rendered Section 19 of the Exchange Act "nugatory" in the absence of implied immunity. *Id.*

Similarly, in *NASD*, the legislative history to several Congressional enactments within the securities laws showed that "bootleg competitors" and sharp practices in the secondary market for re-sales of mutual fund securities, made it desirable

to authorize prohibitions or restrictions on the operation of secondary markets for the re-sale of mutual fund shares. 422 U.S. at 709.

Congress did so. *Id.* at 709-10. Pursuant to this Congressional authorization, the SEC thereafter authorized and approved various conduct by the National Association of Securities Dealers ("*NASD*") to ban re-sale markets or portions thereof for mutual fund shares. The *NASD* members acted accordingly.

In direct conflict with the foregoing congressionally mandated and/or authorized SEC approval, the United States sued the *NASD* under the antitrust laws to void these congressionally desired restraints of trade. The United States also sought to enjoin the ancillary steps of the *NASD* and its members to effectuate these congressionally-desired objectives.

The Court, four justices dissenting, held that this direct conflict and the other circumstances present provided a convincing showing of plain repugnancy in two specific manifestations, and that the statutory scheme displaced the antitrust laws in a third instance regarding the conduct by the *NASD* and its members. 422 U.S. 710-712.

The circumstances for this limited displacement of the antitrust laws were that the *NASD* and its members were working to further the congressionally-desired customer protection measures under the securities laws designed to prevent abuses by eliminating or restricting re-sale markets. This conflicted with the antitrust laws but furthered the securities laws' investor protection purposes.

NASD, thus, presents the polar opposite of this situation. Here, defendants' private business decisions to conspire **violate** the heart of the securities laws and their consistent customer protection purposes. The challenged conduct has never been desired or approved by Congress or the SEC. Pet. App. 66a. Here, unlike *NASD*, the purposes of the federal securities laws and antitrust laws are consistent with respect to the conduct at issue. *Id.* 64a. Also unlike *NASD*, here the challenged conduct is contrary to both statutes and does not further the purposes of the securities statute. *Id.* 64a-67a.

2. Pools

The Decision also noted one of the main evils that caused the enactment of the federal securities laws and that has always been statutorily prohibited by those laws: the inflation of prices above the IPO price by the creation of "pools". Pet. App. 12a-13a; *see* H.R. Rep. 73-1383, 1934 WL 1290 (Leg. Hist.) at *10 ("As a matter of fact, **any pool** which seeks to bring about a change in the price of a security through manipulation is 'illegitimate' according to our definition . . .) (emphasis supplied).

> These operations were designed to give a fictitious appearance of activity to the market and to induce the public to purchase the stock **and thereby relieve the original syndicate of its commitment**. . . . The committee's record contains many examples of manipulation through the **medium of pools**. . . . Manipulative practices such as the foregoing are prohibited by the present bill, under heavy penalties.

(emphasis supplied). S. Rep. 73-792, 1934 WL 1289 (Leg. Hist.) at *8; *see* Section 9 of the Securities Exchange Act, 15 U.S.C. § 78i (prohibiting **joint** or individual action to "raise" prices). Here, the conduct goes far beyond what is required to violate Section 9. That is, the leading investment banks **agreed**, across underwriters and IPOs, to require pools of laddered orders that spectacularly inflated prices and to require tie-in agreements.

Congress expressly empowered actions by investors to enforce Section 9. Congress also provided

> the rights and remedies provided [in the securities laws]. . . shall be in addition to any and all other rights and remedies that may exist at law or in equity.

Securities Act § 16(a), 15 U.S.C. § 77p(a); *see also* Securities Exchange Act § 28(a), 15 U.S.C. § 78bb(a) (similar savings clause).

Plaintiffs' claims "at law" here are precisely such "other rights."

C. Congress Has Never Expressly Immunized Conduct In The Securities Markets From Antitrust Claims And, On The Contrary, Has Expressly Preserved "Any And All" Rights, Including Antitrust Claims, For Investors

Congress has been aware of the repeated, publicized antitrust prosecutions in the securities markets and their beneficial effects for investors and the markets. *E.g.*, *Dingell*, *Markey*, *Powell*, *supra*. Congress has not expressly exempted conduct in the securities markets from the antitrust laws even while it was terminating other non-securities law claims in these markets. *Compare* Pet. App. 70a *with* 15 U.S.C. § 78bb(f)(1)(A) (SLUSA).

On the contrary, at the same time that Congress eliminated certain non-securities law claims, it has otherwise continued to preserve "any and all rights and remedies that may exist at law or equity". 15 U.S.C. § 77p(a). Thereby, Congress preserved investors' well-established, publicized rights and remedies under the federal antitrust laws.

D. This Court's Decisions Have Repeatedly Rejected Implied Antitrust Immunity Where The Antitrust And The Later Statute Have Consistently Prohibited The Specific Challenged Conduct

Where, as here, the antitrust laws and the subsequent regulatory statute both prohibit the challenged conduct, this Court has repeatedly rejected antitrust immunity:

National Gerimedical Hosp. & Gerontology Center v. Blue Cross, 452 U.S. 378, 391, 393 (1981) (nothing in National Health Planning and Resources Development Act required defendant to refuse to deal and to conspire to deny plaintiff entry to relevant market, conduct prohibited by antitrust laws; immunity denied where "no specific conflict between the Act and the antitrust laws");

Otter Tail Power Co. v. United States, 410 U.S. 366 (1973) (electric utility's monopolistic refusals to deal prohibited by

Sherman Act and Public Utility Holding Company Act, which included Federal Power Act; immunity would not be implied);

Carnation Co. v. Pacific Westbound Conference, 383 U.S 213, 216, 222 (1966) (no immunity for rate-making agreements which were not approved by the Federal Maritime Commission and which violated both the Sherman Act and the Shipping Act of 1916);

United States v. Philadelphia Nat'l Bank, 374 U.S. 321, 355 (1963) (no repugnancy where Congress passed Bank Merger Act with no intention of displacing enforcement of antitrust laws against pure stock acquisitions by banks and bank mergers);

Maryland & Virginia Milk Producers Ass'n v. United States, 362 U.S. 458, 472 (1960) (acquisition of competitor to monopolize commerce in fluid milk in regional area prohibited by antitrust laws and Capper-Volstead Act; "We hold that the privilege the Capper-Volstead Act grants producers to conduct their affairs collectively does not include a privilege to combine with competitors so as to use a monopoly position as a lever further to suppress competition by and among independent producers and processors.");

Georgia v. Pennsylvania R. Co., 324 U.S. 439, 458-59 (1945) ("we find no warrant in the Interstate Commerce Act and the Sherman Act for saying that the authority to fix joint through rates clothes with legality a conspiracy to discriminate against a State or a region, to use coercion in the fixing of rates, or to put in the hands of a combination of carriers a veto power over rates proposed by a single carrier," despite the fact that "the Commission has taken some action in that regard"); and

United States v. Borden Co., 308 U.S. 188, 204-05 (1939) (agreement fixing price and supply of fluid milk in Chicago area prohibited by Sherman Act and Capper-Volstead Act; collective marketing authority did not imply antitrust immunity for conspiracy to maintain artificial and non-competitive prices).

E. As The United States Has Consistently Recognized, There Is No "Pervasive Regulation" Immunity For The Challenged Conduct Here

Defendants argue that an alleged conspiracy of investment banks to inflate their underwriting charges and aftermarket securities prices by requiring tie-in or laddering transactions is immune from prosecution under the antitrust laws because Congress, in the federal securities laws, has generally displaced the antitrust laws. Brief at 18-19; *contrast* Pet. App. 69a.

The United States has made clear its position that "[t]he broad immunity urged by petitioners would improperly shield anticompetitive conspiracies that are distinct and separable from the permitted activities of an underwriting syndicate." US Brief at 9. The United States notes further that "[t]his Court has repeatedly rejected the view that all conduct regulated under another statutory scheme enjoys 'a blanket exemption' from antitrust law." *Id.*, *citing National Gerimedical*, 452 U.S. at 392.

The relevance of *Gordon*'s inquiry is not merely to find the "power to regulate" and its "active exercise," but to determine whether that power and its exercise have created conflicting regulatory mandates. The Second Circuit faithfully applied *Gordon* in evaluating and ultimately rejecting the implied immunity defense here. Pet. App. 33a-35a. The court of appeals correctly determined that *Gordon* concerned not, as defendants assert, the "potential for conflict," Brief at 25, 42, but the plain repugnancy of the SEC's long-exercised power to "fix" commission rates with the Sherman Act's prohibition of price fixing. Pet. App. at 32a-33a. The United States agrees with the Second Circuit's, not the defendants', reading of *Gordon*. U.S. Brief at 17. Plaintiffs satisfy the *Gordon* test.

For the same reasons, plaintiffs also satisfy the pervasive regulation standard articulated in *NASD*. Defendants mistakenly argue that this Court implied immunity in *NASD* on the strength of the SEC's assertion that failure to do so would leave its authority "seriously compromised." Brief at 26. Rather, this Court found in *NASD* that there could be "no reconciliation of

[the SEC's] authority" to permit restrictive agreements in the secondary market for mutual funds and "the Sherman Act's declaration that they are illegal *per se*." 422 U.S. at 729; Pet. App. 37a-38a. Again, the United States agrees with the Second Circuit's, not the defendants', reading of *NASD*. U.S. Brief at 18. Plaintiffs satisfy the *NASD* test, as the SEC now acknowledges, prosecution of the beneficial antitrust claims here will not "seriously" nor at all "compromise" the SEC's regulatory authority.

POINT II. Defendants Have The Burden, In Order To Establish Their Implied Immunity Affirmative Defense At The Pleading Stage, To Show That Plaintiffs Can Prove No Set Of Facts Constituting A Non-Immunized Antitrust Claim

On defendants' FRCP Rule 12(b)(6) motion, plaintiffs' well-pled fact allegations are accepted as true and all reasonable inferences are drawn in favor of plaintiffs. *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). Defendants have the movants' burden to establish that there is no set of facts on which plaintiffs can prove a non-immunized antitrust claim. *Id.*[5]

More generally, defendants have the burden to establish all other aspects of their affirmative defense of implied immunity. *Exchange Options*, 317 F.3d 150-151.

Defendants have not even attempted to satisfy their burden if the substantive immunity standard of the Decision and the United States is upheld. Of necessity, defendants' limited attempt to satisfy their burden rests on the acceptance of their new immunity test, applied to their (incorrect) version of the facts here.

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5. Plaintiffs have no burden. *Compare Thill v. New York Stock Exchange*, 633 F.2d 65, 67-69 (7th Cir. 1980) (after earlier reversal of a summary judgment that had granted implied immunity, 433 F.2d 262, a full trial was held after which implied immunity was found to be appropriate).

POINT III. Plaintiffs Satisfy The United States' Incorrect Proposed Pleading Immunity Standard, Which Should Be Rejected

The United States now adds an immunity **pleading** standard that it did not raise below.

> [t]he court [of appeals] should have recognized the immunity not only of collaborative activities that are specifically permitted under the securities laws, but also of those activities that are inextricably intertwined with permitted conduct.

U.S. Brief at 9.

* * * *

> In the context of this suit, therefore, the complaint's allegations must give rise to a reasonably grounded inference of an antitrust violation without relying on conduct that was authorized under the regulatory regime or inextricably intertwined with such immune conduct.

Id. at 23. This Court should not adopt this novel pleading standard that was not raised or considered below. *See* A *infra*. But plaintiffs have satisfied that standard. *See* B *infra*. Alternatively, as the United States proposes (U.S. Br. p. 30: "judgment . . . should be vacated and the case remanded"), remand and leave to replead should be ordered. *See* C *infra*.

A. The United States' Proposed Immunity Standard Violates This Court's Procedural And Substantive Precedent

1. In Asserting That Protected Rather Than Prohibited Conduct Is Challenged Here, And In Speculating About "Inextricably Intertwined", The United States Violates Its Own Precedent, *Conley v. Gibson*

The United States asserts:

> A complaint must allege facts that provide the defendant with concrete notice of the claims against it, *Conley v. Gibson*, 355 U.S. 41, 47 (1957), and give rise to a reasonably grounded belief that the plaintiff may ultimately be able to prove its claim, *see Dura Pharms., Inc. v. Broudo*, 544 U.S. 336, 347 (2005). In the context of this suit, therefore, the complaint's allegations must give rise to a reasonably grounded inference of an antitrust violation without relying on conduct that was authorized under the regulatory regime or inextricably intertwined with such immune conduct.

U.S. Brief at 23.[6]

Defendants' prohibited agreement was made and implemented, in part, through what plaintiffs allege are unlawful "abuses" of otherwise permitted syndicate conduct. C ¶ 5; JA 26. To characterize, as the U.S. does, the conspiracy as "inextricably intertwined" to **permitted** activities is to violate the rule of the very case that the U.S. cites, *Conley v. Gibson*. That is, the U.S. asserts facts that are contrary to the well-pled

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6. Contrary to the suggestion of the United States, this Court was not attempting in *Dura* to state a broad new pleading standard. The Court in *Dura* identified as one goal of the pleading rules to require "*a reasonably founded hope* that the [discovery] process will reveal relevant evidence." 544 U.S. at 347 (emphasis supplied). Nor, of course, did *Dura* consider evidence of permitted conduct in the proof of prohibited conspiracies.

allegations of the amended complaint, *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). Also, it fails to draw reasonable inferences in favor of the amended complaint. The risk of uncertainty in predictions about the future handling of this case is on defendants, not plaintiffs. *See* Point II *supra*.

2. The United States' Standard Should Be Rejected Because It Gives Great Weight To A Lesser Purpose Of The Federal Securities Laws But No Weight To The Important Purpose

Properly considered under the federal securities laws, defendants' alleged efforts (including in syndicates) to require laddering and tie-ins are prohibited activities (not protected ones). The "heart" of the Exchange Act, Section 9(a)(2), was enacted to prohibit a syndicate or others from doing what defendants allegedly did here. Pet. App. 12a-13a.

In this context, the United States' proposed pleading standard gives great weight to a lesser purpose of the federal securities laws (raising capital, including in syndicates) but no weight to the fundamental purpose of the federal securities laws (protecting investors from, among other things, underwriters' abuses).

3. As This Court Re-Affirmed Last Month, Pleadings Need Not Anticipate And Negate Affirmative Defenses

Requiring a heightened pleading standard to negate an anticipated affirmative defense contravenes decades of this Court's jurisprudence, as confirmed only last month by this Court's unanimous decision in *Jones v. Bock*, No. 05-7058 (filed Jan. 22, 2007) (affirmative defense of failure to exhaust administrative remedies need not be anticipated in complaint; "Courts should generally not depart from the Federal Rules' usual practice based on perceived policy concerns").

Implied immunity is an affirmative defense and defendants have failed to raise any error regarding the lower court's holding to this effect.[7]

When considering affirmative defenses based upon various types of immunity, this Court has repeatedly made clear that: "a claim of immunity is conceptually distinct from the merits of plaintiff's claim". *Mitchell v. Forsyth*, 472 U.S. 511, 527-28 (1985); *see also Gomez v. Toledo*, 446 U.S. 635, 640 (1980) ("Moreover, this Court has never indicated that qualified immunity is relevant to the existence of the plaintiff's cause of action; instead we have described it as a defense available to the official in question"); *Barry Aviation Inc. v. Land O'Lakes Municipal Airport Comm'n*, 377 F. 3d 682, 688 (7th Cir. 2004) ("Complaints need not anticipate defenses"); *Xechem, Inc. v. Bristol-Myers Squibb Co.*, 372 F. 3d 899, 901 (7th Cir. 2004) ("Complaints need not contain any information about defenses and may not be dismissed for that omission").

This Court has also consistently "refused to change the Federal Rules governing pleading by requiring the plaintiff to anticipate the immunity defense."[8] *Crawford-El*, 523 U.S. at 595; *see also Gomez v. Toledo*, 446 U.S. at 640 ("Since qualified immunity is a defense, the burden of pleading it rests with the

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7. Here the District Court treated petitioners' assertion of implied immunity as "an affirmative defense that appears on the face of the complaint, and as such is properly addressed at the motion to dismiss stage." *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163, 167 (1993), *quoting Elliott v. Perez*, 751 F.2d 1472, 1473 (5th Cir. 1985). *In re IPO Antitrust Litig.*, 287 F. Supp. 2d 497, 501-02 (S.D.N.Y. 2003), App. 77a; *see also In re Exch. Options Trading Antitrust Litig.*, 317 F. 3d 134, 150 (2d Cir. 2003) (same).

8. This Court has also long refused to require heightened pleading standards in addition to the express instances required by Rule 9(b) of the Federal Rules of Civil Procedure. Any such requirement "must be obtained by the process of amending the Federal Rules, and not by judicial interpretation." *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163, 168 (1993).

defendant [citations omitted]. . . . We see no basis for imposing on the plaintiff an obligation to anticipate such a defense by stating in his complaint that the defendant acted in bad faith").[9]

4. The United States' Standard Should Be Rejected Because It Is Unsupported And Affords More Protection To Conduct That Is Unlawful Under The Securities Laws Than *Noerr-Pennington* Affords To Conduct That Is Protected Under The First Amendment

Tellingly, the United States still cites to no case where the formation of a prohibited conspiracy during permitted meetings has barred a claim as a matter of law. U.S. Brief *passim*. Nor has the U.S. cited to a case that has held permitted activity to be "inextricably intertwined" with the prohibited activity so as grant a motion to dismiss. *Id.*

Lacking case support for a requirement that conduct that is supposedly "inextricably intertwined" with protected conduct be deleted from the complaint, the United States attempts to analogize its new pleading standard to what it calls "*Noerr-Pennington* immunity," which it argues may extend to injury that is itself an "incidental effect" of protected activity. U.S. Brief at 14, *citing Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 142-43 (1961); *see also United Mine Workers v. Pennington*, 381 U.S. 657, 669-70 (1965).

Noerr held that the Sherman Act did not apply to "activities of the railroads at least insofar as these activities comprised mere solicitation of government action with respect to the passage and enforcement of laws." *Noerr*, 365 U.S. at 138. As

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9. *See also Thomas v. Independence Township*, 463 F. 3d 285, 293-94 n.2 (3d Cir. 2006) ("As stated in *Gomez* and reaffirmed in *Crawford-El*, the burden of pleading qualified immunity rests with the defendant, not the plaintiff. . . . Because we conclude that plaintiffs have no duty to plead allegations in anticipation of a qualified immunity defense, we rather easily conclude that plaintiffs do not have the concomitant duty to do so with particularity").

Justice Black noted, the antitrust challenge in *Noerr* was to "[t]he right of petition . . . one of the freedoms protected by the Bill of Rights. . . ." *Id.* The First Amendment has long been described as the very foundation of constitutional government:

> The greater the importance of safeguarding the community from incitements to the overthrow of our institutions by force and violence, the more imperative is the need to preserve inviolate the constitutional rights of free speech, free press and free assembly in order to maintain the opportunity for free political discussion, to the end that government may be responsive to the will of the people and that changes, if desired, may be obtained by peaceful means. Therein lies the security of the Republic, the very foundation of constitutional government.'

New York Times Co. v. United States, 403 U.S. 713, 719-20 (1971) (Black, J., concurring), *quoting De Jonge v. Oregon*, 299 U.S. 353, 365 (1937) (Hughes, C.J.).

However, first, the United States does not attempt to argue that even the underwriters' **legitimate** syndicate behavior is protected activity on an equal footing as Constitutional free speech. U.S. Br. *passim*. Second, plaintiffs challenge only defendants' prohibited abuse, not their legitimate use, of syndicates. Conduct to make or carry out a conspiracy to require laddering and tie-ins, is prohibited, not protected, by the securities laws. Third, the U.S. standard would provide heightened pleading protection to the conduct that is unlawful under the securities laws when that pleading protection has not been provided to First Amendment activity.

5. The United States' Proposed Pleading Standard Stands On Its Head Decades Of Safe Harbor Decisions Which Consistently Prohibit The Conversion Of Protected Activities Into Opportunities To Engage In Violative Conduct And Do Not Provide Heightened Pleading Protection

The United States' novel pleading standard is contrary to numerous safe harbor and evidentiary decisions by this Court and other courts. **Without requiring** heightened pleading protection, these decisions have established and upheld the proposition that otherwise permissible steps under the antitrust laws may not be abused in order to enter into or carry out a prohibited conspiracy.[10]

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10. *See United Mine Workers v. Pennington*, 381 U.S. 657 (1965) (fact that defendants used other conduct permitted under regulatory scheme to engage in conduct prohibited under the regulatory scheme and the antitrust laws would not provide ground for claiming immunity); *Silver v. New York Stock Exchange*, 373 U.S. 341 (1963) (fact that defendants were members of a stock exchange and thereby empowered to communicate with each other to create rules and by-laws governing their relations with the public and with each other was never advanced as a basis for finding applied immunity for alleged anticompetitive collective action in promulgating certain rules); *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 379 U.S. 690, 707 (1962) ("it is well settled that acts which are in themselves legal lose that character when they become constituent elements of an unlawful scheme [citations omitted]"); *In re Brand Name Prescription Drugs Antitrust Litig.*, 186 F. 3d 781, 784-85 (7th Cir. 1999) (cooperative behavior would be permitted under trade association auspices or otherwise and under the antitrust laws provided behavior does not reduce competition among participants); *Ice Cream Liquidation, Inc. v. Land O'Lakes, Inc.*, 253 F. Supp. 2d 262, 267 (D. Conn. 2003) (in case involving alleged collusion to fix prices of certain staple products that were components of a federally regulated formula for minimum milk prices, implied immunity did not apply where plaintiff's challenge was not to the federal milk pricing formula but rather to the defendants' conduct in manipulating the underlying components of the formula); *see also* VII P. Areeda & H. Hovenkamp, ANTITRUST LAW, Section 1477 at 315 (2d ed. 2003).

(Cont'd)

As with other prohibited conspiracies, this one may be formed or implemented through means that are themselves lawful or unlawful. *E.g.*, *In re High Fructose Corn Syrup Antitrust Litig.*, 295 F.3d 651, 655 (7th Cir. 2002) (Posner, J.).

6. The United States' Proposed Pleading Standard Contravenes The "Minimum Extent Necessary" Aspect Of This Court's Immunity Test

The United States' new proposed standard is, in this context at least, contrary to decades of this Court's substantive immunity precedent. As the United States expressly told the Second Circuit, the fundamental importance of the antitrust laws requires that implied immunity be disfavored, such that "even where conflicts between the antitrust laws and regulatory scheme warrant immunity as to some allegations of the complaint," immunity may be implied "only to the minimum extent necessary." Pet. App. 202a, *citing Silver*, 373 U.S. at 357.

7. The United States' Citation To *NASD* Is Inapposite

The United States' citation to *NASD* is inapposite for many reasons, including because the "ancillary" activity there was congressionally-desired activity which protected customers and also furthered the purposes of the securities law. Here, the "ancillary" activity - - - agreeing to require laddering and tie-ins - - - is prohibited by the federal securities laws and defeats their purposes. In *NASD*, Congress and the SEC mandated the restraints of trade and the NASD and private parties implemented the mandate in an "ancillary" or more than ancillary way. Here, private business decisions chose to convert permitted (not mandated) joint activity into unlawful behavior and, indeed, allegedly joint unlawful behavior.

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Furthermore, questions of immunity cannot be treated as rules of evidence that exclude proof of an unlawful conspiracy. While such evidence can be excluded under Fed. R. Evid. R. 403 if confusing or unduly prejudicial, there is no blanket rule of inadmissibility. *See In re Brand Name Prescription Drugs*, 186 F.3d at 789.

In *Phonetele, Inc. v. AT&T Co.*, 664 F.2d 716 (9th Cir. 1981) then-Judge Kennedy distinguished *NASD* as involving anticompetitive practices which had been permitted by Congress. *Id.* at 729 n. 35. His analysis of *NASD* recognized a common-sense test for determining when prohibited conduct was sufficiently related to permitted conduct to be "derivatively immune" from antitrust liability.

In *NASD*, the government had charged both vertical and horizontal anticompetitive activity in agreements to fix prices and restrict sales of mutual funds in secondary market transactions between dealers, between investors and dealers, and between investors. 422 U.S. at 701. The *NASD* Court concluded that the vertical restraints were immune from antitrust challenge as having been explicitly contemplated by statute, and then turned to the challenged horizontal activity. As Judge Kennedy noted in *Phonetele*:

> Count I of the Government's complaint alleged a horizontal conspiracy between NASD and its members to prevent the growth of a secondary dealer or brokerage market for mutual fund shares by means of anticompetitive interpretation and extension of NASD rules. *Id.* The vertical agreements could not have been implemented without some form of concert, *i.e.*, rulemaking and rule enforcement. Thus the defendants' horizontal conduct was *logically necessary to carry out the legitimate agreements and the sanctioned vertical restraints, if not directly responsive to a regulatory command.* Therefore the Court reasoned the concerted activity acquired a kind of derivative immunity by virtue of its relation to the immune restraints implemented by the concerted action.

664 F.2d at 729 (footnote omitted). Unlike the "ancillary" conduct in *Phonetele*, defendants' conspiracy here was not "logically necessary to carry out the legitimate agreements" and it definitely was not "directly responsive to a regulatory command."

8. If *Twombly* Is Affirmed, The United States' Proposed Standard Should Be Rejected For This Further Reason

The pleading standard proposed by the United States appears to be based on the position it has taken in a case pending before this Court styled *Bell Atlantic Corp. v. Twombly*, No. 05-1126. If the pleading standard proposed by the United States is rejected in *Twombly*, it should be rejected here as well.

For all the foregoing reasons, this Court should reject the United States' proposed pleading standard. However, if the Court determines to apply such standard, then plaintiffs demonstrate below that the allegations of their complaint **already** satisfy such standard.

B. Plaintiffs Satisfy The United States' Proposed Immunity Pleading Standard

1. The Plaintiffs' Allegations Must Be Read In The Light Of The Multiple Regulatory Prosecutions Of Defendants' Laddering And Tie-Ins

Numerous administrative enforcement proceedings referred to by the defendants (Brief at 14-15) and the Court of Appeals (Pet. App. 1a-2a), strongly indicate that defendants, individually, engaged in parallel, highly unusual and unlawful conduct. *E.g.*, *Apex Oil Co. v. DiMauro*, 822 F.2d 246, 253 (2d Cir. 1987) ("Parallel conduct can be probative evidence on the issue of whether there is an antitrust conspiracy.").

2. Defendants' Alleged Non-Syndicate Joint Conduct Permits An Inference Of Conspiracy

In this context, plaintiffs have alleged conduct actionable under the antitrust laws which is not intertwined at all, let alone "inextricably intertwined", with legitimate syndicate conduct.[11] *E.g.*:

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11. The United States does not define "inextricably intertwined," although it asserts that implied immunity should extend to "conduct that is directly related to and cannot practicably be separated from permissible conduct, whether or not that inextricably intertwined conduct itself is authorized under the securities laws." US Brief at 12-13.

• In furtherance of the conspiracy, defendants **jointly** informed customers of the laddering and tie-in terms. C ¶ 57, JA 29. Here, defendants are jointly engaging in unlawful conduct. It has nothing to do with a syndicate much less with the legitimate purposes of a syndicate. (Also, if a syndicate's purpose is to assemble market power, and use that power as a lever to require laddering transactions, then the syndicate members are operating unlawfully under the federal securities laws to this extent.) *See Eastman Kodak v. Image Technical Services, Inc.*, 504 U.S. 451, 468-69 (1992).

• Defendants, at times, discussed with one another the amount of laddering to require and the resulting impact on prices. C¶¶ 55-56. JA 29. This, also, is neither syndicate activity nor in any way activity that is protected under the securities laws.

• Defendants monitored their customers' trade activities to ensure that the customers were paying the anticompetitive charges from one IPO to the next, and thus tracked each other's compliance with their unlawful agreement. C ¶ 62-63, JA 30-31. This is jointly implementing an agreement to require laddering - it, too, does not involve syndicate activity and finds no protection under the securities laws. *In re High Fructose Corn Syrup Antitrust Litig.*, 295 F.3d 651, 663 (7th Cir. 2002) (principal manufacturers' monitoring one another's conduct by an "understanding" that they would not undercut the other, supported inference).

• Defendants collectively monitored each other's compliance with the unlawful agreement. *Id.* C ¶¶ 52, 56, JA 27-28. This monitoring and defendants' unlawful agreement are both reflected in defendant Credit Suisse's public statement made shortly after this case was commenced. Credit Suisse stated that its practices in allocating IPOs were consistent with the practices of other underwriters and that, if there was a problem, it was not a Credit Suisse problem but a Wall Street problem. C ¶ 63, JA 31.

• Only through their unlawful agreement were defendants able to combine their market power to exert sufficient influence to inflate all aftermarket prices of Class Securities, on average, 8.5 times as much as during the pre-conspiracy period. C ¶¶ 42-43, 47, JA 26, 27. Thus, the impact of defendants' agreement and activity both increased their market power and better enabled them to increase aftermarket prices.[12] C ¶ 8, JA 13-14. *Strobl v. New York Mercantile Exch.*, 768 F.2d 22, 25 (2d Cir. 1985) (conspiracy more plausible because defendants sought to move prices of an entire market).

• Individual employees of defendants continued to implement the aims of the conspiracy after moving to similar positions with other defendants. C ¶ 59, JA 30. This ex-syndicate allegation, obviously, also involves activity that is not protected under the federal securities laws.

None of the foregoing alleged conduct is "inextricably intertwined" with syndicates or legitimate book-building activities. Rather, each is readily separable from permitted underwriting activities. Even eliminating from consideration defendants' abusive syndicate communications alleged in the complaint, an inference of conspiracy is justified based on the foregoing allegations. Defendants individually engaged in highly unusual, unlawful and parallel conduct that they sometimes jointly imposed on customers. Defendants monitored their compliance with the agreement and are effectively admitted (by Credit Suisse) not only to have known what one another was

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12. More generally, plaintiffs allege:

• Defendants agreed to require customers to pay anticompetitive consideration for IPO shares based on a kickback or "percentage of the customers' profits from the purchase of the IPO shares". C ¶¶ 6, 42; JA 12-13, 26. This behavior is statutorily prohibited by the federal securities laws. *See* Statement of Case, pp. 3-5; and fn.13, *infra*.

• Defendants agreed to require customers to make aftermarket purchases of the Class Security at prices above the IPO price, a practice known as "laddering." C ¶¶ 7, 42; JA 13, 26. This behavior is extremely deleterious and statutorily prohibited by the federal securities laws. *See* Statement of Case, pp. 3-5; and fn.13, *infra*.

doing but to have known that one another was doing the same thing.

Accordingly, plaintiffs have adequately stated a non-immunized Section 1 claim against defendants even under the novel pleading standard now proposed by the United States.

3. Just As Defendants' Tie-Ins And Laddering Were Not "Inextricably Intertwined" With Legitimate Syndicate So As To Prevent Proof Of Laddering And Tie-Ins Under The Regulatory Cases, They Will Not Be "Inextricably Intertwined" Now

The parallel enforcement proceedings referred to by the defendants (Brief at 14-15) and the district court (Pet. App. at 117a-118a & n. 28) are ample evidence that the conspiratorial activity challenged here is capable of being separated from permitted conduct and proven in litigation. And the U.S. concedes that unlawful activity that is not "inextricably intertwined" with protected activity may be considered for purposes of a pleading inference of conspiracy.

Plaintiffs have alleged the following conduct that occurred in connection with a syndicate but clearly is separable from the syndicate and not protected by the federal securities laws:

• Defendants agreed to monitor the levels of participation by non-defendant underwriters in a given syndicate and to reward those underwriters from deal to deal for their adherence to the tie-in agreement, regardless of the identity of the lead underwriter. C ¶ 58; JA 29-30. This is jointly requiring laddering or tie-ins. *In re High Fructose Corn Syrup Antitrust Litig.*, *supra*. This behavior finds no protection under the securities laws.

• Defendants jointly failed to disclose their anticompetitive charges and laddering in the prospectuses for Class Securities. C ¶6,JA12. This is **not** protected activity.

• By reason of their unlawful conspiracy, defendants' market share grew during the Class Period from 73% of the total dollar amount of all equity underwritings and 71% of technology-

related underwritings to about 87% and 90%, respectively. C ¶ 38; JA 25.

• Defendants centralized their pools of laddered orders in one defendant's hands to drive up prices above the IPO price more effectively. C ¶ 52; JA 28. Conduct which is protected loses its protected character when it is abused for unlawful purposes.

Considering these additional allegations, the inference of conspiracy raised by plaintiffs' allegations is yet stronger.

C. Leave To Amend Should Be Granted

Should this Court determine to adopt the United States' new pleading standard, and should this Court find plaintiffs' allegations "inextricably intertwined" or lacking in any way, then the Court should permit plaintiffs leave to replead. *Compare*, U.S. Brief at 27, 30 (this case should be remanded for further proceedings) *with Dura Pharm., Inc. v. Broudo*, 544 U.S. 336, 348 (2005) (after clarifying pleading standards for securities fraud claims and finding plaintiffs' complaint "legally insufficient," the Court nonetheless remanded the case for "further proceedings consistent with [that] opinion."); *Crawford-El v. Britton*, 951 F.2d 1314, 1322 (D.C. Cir. 1991) (remanding to the district court for plaintiff to amend his complaint where complaint deemed insufficient to meet intervening precedent changing pleading standards); Fed. R. Civ. P. 15(a) (leave to amend a party's pleading "shall be freely given when justice so requires").

The many enforcement proceedings and five years of investigation that have occurred since the filing of plaintiffs' complaint permit plaintiffs to allege many further facts complying with the United States' novel standard. These facts show highly unusual, parallel and sometimes joint behavior. This behavior could best be accomplished by and is more probably the result of agreement.

POINT IV. Plaintiffs Satisfy Defendants' Incorrect Antitrust Immunity Standard, Which Should Be Rejected

In order to try to carry their movants' burden, defendants

(1) delete important, beneficial elements of this Court's traditional immunity analysis, *e.g.*, "to the minimum extent necessary", "implied repeal is disfavored", and "reconcile the operation of both statutes"; (*see* IA4, *supra*).

(2) inject unprecedented, inappropriate considerations into the immunity analysis, *e.g.*, *Trinko*'s test for whether to recognize a new duty of a monopolist to aid competitors;

(3) change or dispute the legal and factual circumstances determined to exist here by the Court of Appeals and the United States; and

(4) advocate major policy changes based on fact assertions that are not appropriately resolved in this forum and, moreover, are contrary to important Congressional purposes in both the securities and antitrust laws.

A. Defendants' Proposed New Antitrust Immunity Standard Is Incorrect

Injecting *Trinko*'s "new claim" analysis into and deleting traditional elements (*see* IA4, *supra*) from this Court's immunity analysis is improper. In essence, the plaintiffs in *Trinko* wanted to create a novel antitrust monopoly claim based on the Petitioners' alleged failure to provide sufficient aid to its own competitors. 540 U.S. at 411. Thus, competing with one's competitors - conduct that was previously encouraged by the antitrust laws - was challenged in *Trinko*. *Id.* This Court reasoned in *Trinko*:

> (a) that The Sherman Act is indeed the "Magna Carta" of free enterprise", *United States v. Topco Associates, Inc.*, 405 U.S. 596, 610, 92 S.Ct. 1126, 31 L.Ed. 2d 515 (1972) 540 U.S. at 415-416;
>
> (b) but "we do not believe that traditional antitrust principles justify adding the present case to the few

existing exceptions from the proposition that there is no duty to aid competitors". 540 U.S. at 411;

(c) that the duties imposed on incumbent local exchange carriers ("LEC") by the Telecommunications Act did not justify a modification of traditional (no duty to aid competitors) principles in part because Congress expressly provided that "nothing in this Act or the amendments made by the Act shall be construed to **modify** . . . the antitrust laws". [emphasis supplied] (*Id.* 406); and

(d) there were particular complications to a Section 2 monopoly claim (that do not apply to Section 1 claims) that help make the costs of recognizing a new claim greater than the benefits.

This Court also relied on the difficulties of proving a Section 2 monopoly claim which are not present in a Section 1 conspiracy claim. *Id.* at 411-12. Regarding the monopoly claim, conspiracies are more dangerous than individuals acting unilaterally because the concerted cooperation makes it more likely that the illegal conduct will be achieved. *See* 6 AREEDA & HOVENKAMP ¶ 1402a1, at 9 (2d ed. 2003)("Cooperation increases the risk of anticompetitive action and results, expands market power, creates an anticompetitive restraint not otherwise possible, and surrenders important decision-making autonomy on a matter of competitive significance."); ¶ 1402a4, at 10 ("While the unilateral creation of market power is a costly and risky enterprise, colluders can create it in a single meeting."); *Mobil Oil Corp. v. Blanton*, 471 U.S. 1007, 1008 (1985) (Unilateral conduct is far less likely to pose a threat to competition than concerted action); *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 768-769 (1984)(same). Defendants try to justify their alterations in the immunity analysis based on the

supposed differences between the antitrust and securities laws. Contrary to defendants' arguments, the securities laws are not the flexible friend and the antitrust laws are not the threatening monolithic enemy of the specific conduct here.

From its original consideration of what became the securities laws, to its express language in the enactment of those laws, to its re-enactment of those laws and ongoing oversight of the SEC for seventy-plus years, Congress has always statutorily prohibited individual or joint efforts of underwriters to raise prices above the IPO price and tie-ins kickbacks to profit from such increases. Pet. App. 14a, 66a-67a; *see* Statement of Case, *supra*.

Contrary to defendants' argument, the SEC has **not** "actively regulated" the conspiratorial conduct here because such conduct has always been "out of bounds", **not** subject to SEC line drawing, and statutorily prohibited. But the SEC, along with the United States and private parties, has always prosecuted this precise conduct in order to enforce Congress' prohibition thereof. In sum, in order to protect investors, Congress has always statutorily prohibited the particular challenged conduct here in the securities laws.

In contrast, the antitrust laws may permit joint ventures.[13] Indeed, the antitrust laws further permit even "ancillary restraints" by joint venturers if such restraints are pursuant to the legitimate purposes of the joint venture and serve to increase output, benefit customers, and promote efficiency. *E.g.*, *Broadcast Music, Inc. v. Columbia Broadcasting System*, 441 U.S. 1, 20 (1979) (blanket music license not subject to per se treatment because it "accompanies integration of sales, monitoring and enforcement against unauthorized copyright

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13. *See* April 2000 *Antitrust Guidelines for Collaborations Among Competitors*, issued by the Federal Trade Commission and the U.S. Department of Justice, available at *www.ftc.gov/os/2000/04/ftcdojguidelines.pdf* ("Guidelines") at 3, 6.

use" which would present problems and expense if left to individuals). Spreading and diversifying risk, increasing efficiency in "building the book", and efficiently preparing for the prospective distribution of the shares may all be legitimate purposes under the antitrust laws of a joint venture underwriting syndicate. So is the ancillary restraint of jointly setting and adhering to the IPO price.[14] *See Texaco Inc. v. Dagher*, ___ U.S. ___, 126 S. Ct. 1276, 1280, 1281 (2006).

But the specific challenged conduct here goes far beyond what is necessary to the foregoing. It hurts consumers, efficiency and output. It does so, among other things, by inflating **aftermarket** prices above the IPO price, inflating effective underwriting charges, and sending uncompetitively determined, terrible aftermarket price signals to investors about where they should allocate their capital. Whether the collusive conduct here is ultimately judged under the *pro se* approach, the quick-look approach, or another point on the continuum of antitrust analysis is a matter for the trial court at a later stage of this case. *See California Dental Ass'n v. FTC*, 526 U.S. 756, 789 (1999) ("our categories of analysis

14. Further, the antitrust laws reflect and, to an extent, accommodate stock exchanges to provide specific breathing space to carry out the Securities Exchange Act, *i.e.*, "recognizing that they can set up barriers to membership . . . " the Exchange will engage in restraints of trade that might well be unreasonable . . . ". *See Jacobi v. Bache & Co.*, 520 F.2d 1231, 1237-38 (2d Cir. 1975); 1A AREEDA & HOVENKAMP ¶ 240o3, at 12 (2d ed. 2003)("the antitrust laws can and do consider the particular circumstances of an industry and therefore adjust their usual rules to the existence, extent, and nature of regulation."); *Board of Trade of City of Chicago v. United States*, 246 U.S. 231, 241, 38 S.Ct. 242, 245 (1918) ("Every Board of Trade and nearly every trade organization imposes some restraint upon the conduct of business by its members. Those relating to the hours in which business may be done are common; and they make a special appeal where, as here, they tend to shorten the working day or, at least, limit the period of most enacting activity.")

are less fixed than terms like 'per se,' 'quick look,' and 'rule of reason' tend to make them appear").

The guiding purposes of the antitrust laws - - - increasing output, promoting consumer welfare, and promoting efficiency[15] - - - are **not** identical with the federal securities laws' purposes of protecting investors and promoting capital raising, efficiency, and competition.[16]

However, contrary to defendants' argument, the purposes of the antitrust laws and securities laws **wholly overlap** and are fully congruent and complementary with respect to the prohibition of the deleterious conduct here.

Defendants' pastiched implied immunity standard should be rejected.

B. The Decision Correctly Rejected Defendants' Repeated Argument That Plaintiffs Challenge Underwriting Syndicates And, Therefore, Raise A Conflict Between The Securities And Antitrust Laws

Defendants repeatedly misconstrue plaintiffs' complaint as alleging to be unlawful under the antitrust laws either underwriting syndicates generally, or these defendants' specific underwriting syndicates.

On the basis of this misconstruction, defendants repeatedly argue and re-argue that the antitrust laws and securities laws are in conflict. Brief at 5-8, 15-16, 45-48. Plaintiffs do not make any claim that syndicates generally or here are unlawful. *Compare* A *supra* (joint venture syndicates and their proper ancillary restraints may be lawful under the antitrust laws). Therefore, as the Court of Appeals found, plaintiffs do not attack defendants' syndicates. Pet. App. 61a

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15. *E.g.*, *National Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Oklahoma*, 468 U.S. 85, 107-08 (1984).

16. *See Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350, 360-61 (1991).

n. 47. Defendants' repeated arguments to the contrary (Brief at 3-8, 27-34, 37-38 and 48), are simply wrong.

Plaintiffs do allege that these particular defendants at various times (including during their specific syndicate activities), did discuss tie-in laddering agreements and their effects on prices; did agree to work together to impose same; and did work together jointly to impose on customers such agreements. C¶¶ 5 – 8, 38 - 64; JA 12-14, 25 - 31. By abusing their time together in the syndicates to agree to require laddering and tie-ins, defendants violated the securities laws. If plaintiffs prove this abuse, then plaintiffs will be proving conduct that definitely violates the securities laws and is probative of an agreement to fix prices and charges in violation of Section 1 of the Sherman Act.

C. Defendants' "Doubly Prohibited" Immunity Argument Fails

Defendants assert that the United States and plaintiffs "have it backwards" because two decisions outside the long line of antitrust immunity rulings by this Court (*see* Point I, D) have supposedly found immunity for conduct that was statutorily prohibited by both the antitrust and the regulatory law. Brief at 44-45, *citing* to *Brown v. ProFootball*, 518 U.S. 231 (1996) ("*Brown*") and *Pan American World Airways, Inc. v. United States*, 371 U.S. 296 (1963). ("*Pan American*").

Brown refutes defendants' position. In *Brown*, this Court "assumed that such conduct, as practiced in this case, is unobjectionable as a matter of labor law and policy. On that assumption, we conclude that the [antitrust] exemption applies." 518 U.S. 238. Thus, the express basis for the decision in *Brown* was that the conduct was lawful under the regulatory statute. Moreover, the legislative history of the labor law expressly indicated that there **was** to be an antitrust immunity for the conduct. *Id.* at 237-239.

Pan American also refutes defendants' position. First, antitrust damages claims (such as made here) and other civil claims were **not immunized** from the antitrust laws by this Court. *Compare Pan American*, 371 U.S. at 306 *with Hughes Tool Co. v. Transworld*, 409 U.S. at 410. Second, the Civil Aeronautics Act ("CAA") was promulgated in pre-war conditions in 1938 and granted numerous express antitrust exemption powers to the Civil Aeronautics Board ("CAB"). Third, the CAA expressly entrusted the President, not the Courts, with the review of certain parts of the "national defense" sensitive rulings by the CAB of the airline industry: "Competition among air carriers is being carried to an extreme, which tend to . . . render unsafe a transportation service . . . [that is] required in the public interest, in the interest of the Postal Service and of the national defense". 371 U.S. 301, *quoting* from the legislative history. Fourth, there was, unlike here no legislative history indicating that the very conduct at issue motivated the passage of the regulatory legislation nor were there repeated prosecutions of the express conduct similar to that challenged in *Pan American*. Fifth, the CAA had many powers to issue antitrust exemptions. *Id.* at 305.

In the foregoing context, this Court held that the CAB, not the Courts, had to determine injunctive relief and supervise any on-going potential break up of an airline joint venture as Congress intended. *Id.*

D. Defendants' Policy Arguments Are Inappropriate In This Forum And Wrong

1. Treble Damages Are Compensatory Not Punitive

Contrary to defendants (*see* Pet. Brief, p. 39), this Court has consistently upheld treble damages not as punitive in nature, but rather as serving compensation and deterrence. *E.g.*, *Atlantic Richfield Co. v. USA Petroleum*, 495 U.S. 328, 330 (1990); *California v. ARC Am. Corp.*, 490 U.S. 93, 102 (1989). Treble damages have been asserted to be commensurate to the total

actual damages caused by the alleged violations[17], which, in practice, are difficult to detect[18] and prove.

2. Antitrust Laws Or Restraint Of Trade Laws Have Been Beneficially Prosecuted Against Conduct In The Securities Markets For Centuries

Prior to and since the enactment of the federal securities laws, restraint of trade and antitrust claims have been enforced against manipulators of securities prices for over two hundred years.[19] These claims have repeatedly been

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17. *See* Robert H. Lande, *Are Antitrust Damages Really Single Damages?*, 54 Ohio St. L.J. 115 (1993) arguing that added variable costs result in a damages calculation that is at most single damages when compared to the full harm, *i.e.*, the costs to plaintiffs to litigate, the costs to the judicial system to handle the case, the allocative inefficiencies of market power as well as basic tax effects.

18. Peter G. Bryant & E. Woodrow Eckard, *Price Fixing: The Probability of Getting Caught*, 48 Rev. Econ. & Stat. 531, 531-36 (1991).

19. *Sampson v. Shaw*, 101 Mass. 145 (1809); *Livermore v. Bushnell*, 12 N.Y. Sup. Ct. (5 Hun.) 285 (1885) (condemning and enjoining agreement to inflate stock prices as an unlawful restraint of trade). *See also Pirnie Simons & Co., Inc. v. Whitney*, 144 Misc. 812, 259 N.Y.S. 193 (Sup.Ct. N.Y.Co. 1932) (under New York's antitrust statute, the Donnelly Act, enjoining *pendent lite* New York Stock Exchange from enforcing rule prohibiting its members from selling "packaged" securities to non-members); *Fisher v. Bush*, 42 N.Y.Sup.Ct. (35 Hun.) 641 (1885) (condemning certain types of collective restraints of stock sales); *Ridgely v. Keene*, 134 App. Div. 647, 119 N.Y.s. 451 (2d Dept. 1909) (court refused to enforce illegal contract to drive up price of security); *Silver v. New York Stock Exchange*, 373 U.S. 341 (1963) (although exchange members were empowered to communicate with each other and create rules and by-laws governing their conduct, immunity not implied for anticompetitive action requiring disconnection of private telephone wires from plaintiff to member brokers); *In re Nasdaq Market-Makers Antitrust Litig.*, 894 F.Supp. 703 (S.D.N.Y. 1995) (upholding allegations of Section 1 conspiracy to inflate the charge for market-making services); *United States v. Alex. Brown & Sons, Inc.*, 963 F. Supp. 235 (S.D.N.Y. 1997) (same); *see infra* re the many beneficial effects of these prosecutions; *Dillard v. Merrill Lynch, Pierce, Fenner*

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brought against: collusive conduct on securities exchanges and commodities exchanges, *United States v. Patten*, 226 U.S. 525 (1913); *Board of Trade of City of Chicago v. Christie Grain & Stock Co.*, 198 U.S. 236 (1905); *Strobl v. New York Merc. Exch.*, 768 F.2d 22 (2d Cir. 1985). Since the passage of the federal securities laws, antitrust claims have been brought against collusive conduct by brokers to inflate their underwriting charges for certain types of initial public offerings, *In re Public Offering Fee Antitrust Litig.*, 2004 WL 350696 (S.D.N.Y. Feb. 25, 2004) (upholding Section 1 claim that investment banks (who are also defendants here) inflated their underwriting charges for certain offerings), and *U.S. v. Morgan*, *supra*, or their market-making charges for aftermarket trading. *Nasdaq*, *supra*. Also during this time, antitrust claims have been brought against collusive conduct by investment banks to boycott or divide markets, or make collusive bids for securities. *Id.*; *see* n.19, *supra*.

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& Smith, Inc., 961 F.2d 1148 (5th Cir. 1992) (no antitrust immunity for Section 1 boycott claim against brokerage firms which offered services in contracts containing the same mandatory arbitration clause); *United States v. Morgan*, 118 F.Supp. 621 (S.D.N.Y. 1953) (government failed to prove that leading investment banks agreed to divide markets and refrain from competing for customers); *United States v. Salomon Bros., Inc.*, 57 Fed. Reg. 29,743 (1992) ("*Salomon*") (the DOJ charged that defendants conspired to amass substantial positions (reaching 100%) in the May 1991 notes; Salomon agreed to pay $290 million, including $135 million to the DOJ and the SEC, $55 million to the DOJ's asset forfeiture fund, and $100 million to a victim compensation fund); United *States v. Steinhardt Management Co. & Caxton Corp.*, 1995 WL 10627 (DOJ Notice, Jan. 13, 1995); collusive bids restrain trade in certain Treasury notes); *United States v. Salomon Bros., Inc.*, 57 Fed. Reg. 29,743 (1992) (same); *Peterson v. Philadelphia Stock Exchange*, 717 F. Supp. 332, 335 (E.D. Pa. 1989) (trader's claim that the exchange and a securities firm conspired to blacklist him from the securities market was not immune from the Sherman Act; court found that the alleged conspiracy was beyond the regulatory authority of the SEC, and thus not immune from the antitrust laws).

These prosecutions have had beneficial effects: *See* Kaplan, *Antitrust As A Public-Private Partnership: A Case Study Of The Nasdaq Investigation*, 52 Case Western Reserve L. Rev. 111 (1999); *Nasdaq*, 187 F.R.D. 466 (S.D.N.Y. 1998); *U.S. v. Alex Brown & Sons, Inc.*, 963 F. Supp. 235, 239 (S.D.N.Y), *aff'd*, 153 F.3d 16 (2d Cir. 1998).

> In addition to the considerable benefit conferred upon the class members, there is also an appreciable benefit to the public in this case. Meritorious class actions, such as the present action, promote private enforcement of, and compliance with, the antitrust laws. Indeed, Class Counsel report that **spreads are now 41 percent lower than they were at the start of this action**.
>
> The role of Class Counsel was critical, not only in achieving the significant [$1.027 billion] recovery, but in framing the issues which became the subject of the civil investigative demands of the Antitrust Division of the Department of Justice. **This Class action litigation was the foundation stone for the consent decree which ended the practices complained of.**

In re Nasdaq Market-Makers Antitrust Litig., 187 F.R.D. 465, 487-88 (S.D.N.Y. 1998) (emphasis supplied).[20]

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20. Calkins, An Enforcement Official's Reflections on Antitrust Class Actions, 39 ARIZ. L. REV. 413, 422 (1977) (then-general counsel of the Federal Trade Commission noting that "NASDAQ did not follow a prior governmental investigation. Indeed, the private action appears to have **triggered** the governmental activity." [emphasis supplied]); John C. Coffee, Jr., Adolph A. Berle Professor of Law at Columbia Law School and member of the Legal Advisory Board to the *amicus* National Association of Securities Dealers, stated that not only did private plaintiffs "awake the federal government to . . . price collusion that the government had previously ignored," but also pulled "the principal laboring oar in advancing this case." Affidavit at ¶ 24, *In re*

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When, as here, parties have engaged in conduct that violates Congress' prohibitions in both the antitrust laws and regulatory laws, parallel or joint prosecutions of such conduct under both statutes has frequently proceeded to beneficial effect.[21] This

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Nasdaq Market Makers Antitrust Litig., M.D.L. No. 1023, 94 Civ. 3996 (RWS) (S.D.N.Y. 1998). Paul Schultz, co-author of William Christie & Paul Schultz, Why Do NASDAQ Market Makers Avoid Odd-Eighth Quotes?, 49 J. FIN. 1813 (1994), concluded that "I have no doubt that neither the settlement, nor the lasting improvement in Nasdaq spreads, would have occurred in the absence of the vigorous and creative prosecution of the class action. . . . I believe, from my conversations with him, that Professor Christie is of the same opinion." Affidavit at ¶ 6, *In re Nasdaq Market Makers Antitrust Litig.*, M.D.L. No. 1023, 94 Civ. 3996 (RWS) (S.D.N.Y. 1998).

21. *United States v. Salomon Bros., Inc.*, 57 Fed.Reg. 29,743 (1992) (government antitrust enforcement action); *Three Crown Ltd. Partnership v. Salomon Bros., Inc.*, 1995 WL 422467 (S.D.N.Y. July 14, 1995) (private antitrust action); *Compare In re Nasdaq Market-Makers Antitrust Litig.*, 894 F.Supp. 703 (S.D.N.Y. 1995) (private antitrust action) *and United States v. Alex. Brown & Sons, Inc.*, 963 F.Supp. 235 (S.D.N.Y. 1997) (government antitrust enforcement action) *with In the Matter of Certain Market Making Activities on the NASDAQ*, Exchange Act Release No. 34-40900, 1998 WL 919673 (Jan. 11, 1999) (SEC prosecution of wrongdoing similar to that in the antitrust case) *and Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154 (3d Cir. 2001); *Compare* SEC order (beneficial effect) *with* DOJ (beneficial effect) and *In re Stock Exchanges Options Trading Antitrust Litig.*, 317 F.3d 134 (2d Cir. 2003) (civil settlement upheld but immunity also upheld). In its submission in this case to the court below, the DOJ twice took exception to the *Exchange Options* immunity standards as incorrectly implying immunity where Congress intended none. Pet App. 203a [illegible], 207a n. 8; *Strobl v. New York Mercantile Exchange*, 768 F.2d 22, [illegible] (2d Cir. 1985), *cert. denied sub nom. Simplot v. Strobl*, 474 U.S. 1006 (1985); *Minpeco v. Hunt*, 718 F. Supp. 168 (S.D.N.Y. 1989).

In *Nasdaq*, defendants' bids and offers created an overall wide spread across different market-makers and different securities, which increased defendants' effective charge to customers and violated Section

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includes collusive activity to rig bids, to widen the charges that intermediaries extract for purchasing and selling securities, to divide securities markets, or to manipulate and fix the price of an item or commodity.

3. Antitrust Prosecutions Of Conduct In The Securities Markets Have Promoted Capital Raising But Defendants' Deleterious Practices And Overcharges Chill Capital Raising

Reduced transaction costs in trading securities and better compliance resulting from the *Nasdaq* antitrust prosecution have aided capital raising and reduced the "capture" of the regulators by the regulated. *Compare Order Execution Obligations*, 61 F.R. 48290 (SEC Sept. 12, 1996) (adopting Rules promulgated under 11Ac1) and *In the Matter of National Association of Securities Dealers, Inc., Order Instituting Public Proceedings Pursuant to Section 19(h)(1) of the Securities Exchange Act of 1934, Making Findings and Imposing Remedial Sanctions*, 1996 WL 447193, Rel. No. 34-37538, (SEC Aug. 8, 1996) (SEC proceeding, which also grew out of private and government antitrust enforcement actions, **re-organized the *NASD*** for better compliance; helped investors and capital raising in ways that extended far beyond the dramatic reductions in Nasdaq market-maker spreads); *with*, Prof. George J. Stigler, *The Theory of Economic Regulation*, p. 1 ("regulation is acquired by the industry and is designed and operated primarily for its benefit," but outside influences as here, can reduce this "capture" of the regulator by the regulated).

However, defendants' collusive inflation of prices to unsustainable levels and inflation of their underwriter charges

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1 of the Sherman Act. *In re Nasdaq Market-Makers Antitrust Litig.*, 894 F. Supp. 703 (S.D.N.Y. 1995). Similarly, defendants' alleged conspiracy profited by creating a wide spread across underwriters and IPOs, between the IPO price and the immediate aftermarket prices in order to increase defendants' effective charge to customers. C ¶¶ 1, 6, 7, 42, 62; JA 11-13, 26, 30.

hurts capital raising. *See* THE COST OF CAPITAL: AN INTERNATIONAL COMPARISON (JUNE 2006), commissioned by the London Stock Exchange ("LSE") and the City of London Corporation from Oxera Consulting Ltd. at 4-5, available at *www.oxera.com/cmsDocuments/Reports/Cost* of Capital_an international comparison.pdf.' (finding that (1) "issuing equity on the London markets is cheaper than on NYSE or Nasdaq, mainly because of the systematically higher underwriting fee charged for US transactions"; (2) underwriting fees averaged 3-4% on European exchanges but were "significantly higher" on US transactions, averaging 6.5-7%; (3) professional fees for legal, accounting and advisory services "in London tend to be higher than in Frankfurt and Paris, but not as high as in New York."). Contrary to defendants' attacks, this report makes no mention of litigation or class actions, let alone antitrust claims, as burdening or capital formation underwriting in the United States.).

CONCLUSION

For the foregoing reasons and authorities, respondents Glen Billing, *et al.*, respectfully submit that this Court should affirm the judgment of the court of appeals in all respects. In the alternative, the Court should remand with leave to replead the complaint.

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Respectfully submitted,

CHRISTOPHER LOVELL
Counsel of Record
GARY S. JACOBSON
WRITER C. CLAYTON
IMTIAZ A. SIDDIQUI
EDWARD Y. KROUB
CHRISTOPHER M. MCGRATH
LOVELL STEWART HALEBIAN LLP
500 Fifth Avenue
New York, New York 10110
(212) 608-1900

MELVYN I. WEISS
MILBERG WEISS & BERSHAD LLP
One Pennsylvania Plaza
New York, New York 10119
(212) 594-5300

RICHARD S. SCHIFFRIN
SCHIFFRIN BARROWAY TOPAZ
& KESSLER LLP
280 King of Prussia Road
Radnor, Pennsylvania 19087
(610) 667-7706

HOWARD B. SIROTA
SIROTA & SIROTA LLP
110 Wall Street, 21st Floor
New York, New York 10005
(212) 425-9055

FRED TAYLOR ISQUITH
WOLF HALDENSTEIN ADLER
FREEMAN & HERZ LLP
270 Madison Avenue
Ninth Floor
New York, New York 10016
(212) 545-4600

Counsel for Respondents Glen Billing, et al.

Additional Counsel for Respondents

J. Douglas Richards
Pomerantz Haudek Block
Grossman & Gross LLP
100 Park Avenue
New York, New York 10017
(212) 661-1100

Einer Elhauge
1563 Massachusetts Avenue
Cambridge, Massachusetts 02138

Jonathan R. Macey
27 Rimmon Road
Woodbridge, Connecticut 06525

(1)

No. 05-1157

IN THE

Supreme Court of the United States

CREDIT SUISSE FIRST BOSTON LTD., *et al.*,

Petitioners,

v.

GLEN BILLING, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENT MILTON PFEIFFER

RUSSEL H. BEATIE
BEATIE AND OSBORN LLP
521 Fifth Avenue
34th Floor
New York, New York 10175
(212) 888-9000

Attorneys for Respondent Milton Pfeiffer

200650

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

Plaintiff Milton Pfeiffer, on behalf of himself and all others similarly situated, submits this brief in opposition to Defendants' Petition for a Writ of Certiorari. The Petition should be denied.

The United States Court of Appeals for the Second Circuit accurately applied the law governing implied immunity when it found no implied immunity for Defendants' unlawful conduct. The Petition presents no substantive reason for review. In addition, the Petition makes precise review impossible by mischaracterizing the decision of the Second Circuit (thus presenting a non-existent or non-justiciable issue for review) and misstating Pfeiffer's claim (thus offering the Court a non-existent or a non-justiciable matter for review).

Defendants contend that unless this Court reverses the Second Circuit's decision, the plaintiffs' bar will file antitrust strike suits, clog the federal courts, consume enormous judicial resources, and disrupt the capital formation process. (Cert. Pet. 27-30). Not so. The decision has not encouraged the filing of antitrust strike suits because it is limited to conduct that violates the antitrust laws and that Congress flatly barred by statute. If Defendants wish to avoid future liability, they should not engage in conduct the Second Circuit described as an "epic Wall Street conspiracy." *See* App. 1a-2a.

The Decision of the Second Circuit. To enhance their request for review, Defendants misstate the standard the Second Circuit applied to the two antitrust complaints. For thirty pages Defendants discuss "the court of appeals' rejection of implied immunity" (Cert. Pet. 30) and claim that the decision "requir[es] an overt statement of legislative intent" (Cert. Pet. 13), i.e., an express statement of immunity. In fact, the Court of Appeals applied a test of implied immunity, not express immunity, *see* App. 49a-53a; and as the basis for implied immunity, it specified five factors, it took from the decisions of this Court. *See* App. 53a-56a, 57a, 64a-67a.

Pfeiffer's Claims. Respondent Pfeiffer sued a group of "Institutional Defendants" and "Underwriter Defendants" for

violating the commercial bribery provision of Section 2(c) of the Robinson-Patman Act, 15 U.S.C. § 13(c), by paying and receiving bribes to manipulate the prices of hot issue, initial public offering securities in the aftermarket. The Second Circuit correctly described Pfeiffer's claim in its opinion: the Underwriter Defendants paid bribes to, or received bribes from, the Institutional Defendants to participate in a scheme designed to inflate the price of the hot issue securities in the aftermarket. *See* App. 18a-19a. Defendants mischaracterize Pfeiffer's claim as "based on the same alleged conduct" as the Sherman Act complaint (Cert. Pet. 3) and as "an 'indiscriminate assault' on [the] system of capital formation." (Cert. Pet. 2).

Unlike plaintiff Billing, the Sherman Act plaintiff, Pfeiffer does not seek recovery for pre-offer underwriting activities. He does not attack "road shows," building the book, or any other acts prior to the sale of the securities to the public. He does not challenge (or even mention) the combination of underwriters into underwriter syndicates, the centralizing agreement among underwriters, the application of the underwriter discount to underwriters who did not sell their allotment; does not challenge the syndicate system, road shows, the participation in self regulatory organizations, or the function as market makers; nor does he challenge the Defendants' ability to collaborate with one another in trade associations; hold meetings among top executives; disclose the names of customers who received allocations; or maintain systems that allowed them to review commissions, charges, and other payments received. (Cert. Pet. 3, 7).

All conduct that Pfeiffer alleges to be unlawful occurred in the aftermarket, i.e., after the shares had come to rest in the hands of investors. His theory does not, contrary to repeated arguments by Defendants, threaten the capital raising abilities of the United States financial markets. *See* App. 19a.

REASONS FOR DENYING THE PETITION

I. THE DECISION BY THE SECOND CIRCUIT DOES NOT CONFLICT WITH THIS COURT'S DECISIONS ON IMPLIED IMMUNITY

The Second Circuit correctly concluded that Congress did not intend to immunize Defendants unlawful aftermarket activities from the antitrust laws. In their Petition, Defendants mischaracterize the Second Circuit's decision and argue that it creates a "novel" test of express immunity that conflicts with this Court's earlier rulings of implied immunity. (Cert. Pet. 13, 19, 24).

After beginning with the premise that implied repeal is disfavored and should be granted only when there is "clear repugnancy" between the applicable antitrust laws and securities laws and then only to the minimum extent necessary, the Second Circuit held that the "touchstone" of the implied immunity analysis is Congressional intent. *See* App. 53a. In *Gordon v. New York Stock Exch., Inc.*, to determine congressional intent on repeal of the antitrust laws, this Court analyzed: (1) legislative history and statutory structure; (2) the possibility for conflicting mandates; (3) the possibility that application of the antitrust laws would moot a regulatory provision; (4) the history of agency regulation of the anticompetitive conduct; and (5) any other evidence indicating Congress intended to repeal the antitrust laws. *See* App. 57a; *Gordon v. New York Stock Exch., Inc.*, 422 U.S. 680-681, 689-690 (1975). The Second Circuit reviewed these factors and determined that they created no potential for conflict between the antitrust laws and the securities laws when applied to the conduct challenged by the two antitrust complaints. *See* App. 64a-67a.

By applying the factors this Court enunciated in *Gordon*, the Second Circuit has not created a "novel" test, it has not created a conflict with this Court's implied immunity rulings, and it has not diverged from the standards employed by other circuit courts. The Second Circuit relied on factors of which

one or more can demonstrate Congressional intent to repeal the antitrust laws by implication. It does not require any particular factor for implied immunity, nor does it hold that all or any one of the factors must be present before a court can find implied immunity. *See* App. 53a-57a.

Defendants also argue that, whenever the SEC asserts it has discretion and authority to act, the Court should blindly follow the SEC. (Cert. Pet. 10-12). But this Court has held that "whether implied repeal of the antitrust laws is necessary to make the Exchange Act provisions work is a matter for the courts." *Gordon*, 422 U.S. at 686; *Ricci v. Chicago Mercantile Exch.*, 409 U.S. 289, 306-308 (1973). Although the court may defer to a regulatory agency to take advantage of the agency's special expertise, the final decision is still for the courts. *Gordon*, 422 U.S. at 686; *Ricci*, 609 U.S. at 306-308. To keep its authority, discretion, and jurisdiction as large as possible, the SEC applies a knee-jerk answer to all antitrust immunity questions: it always finds implied repeal. In its *amicus* submission, the SEC says that the courts should find immunity even when the SEC is not empowered to authorize the specific conduct challenged. *See* App. 192a. This Court, in *Silver*, specifically rejected this argument and held there is no antitrust immunity when the SEC does not have the ability to authorize or require the challenged conduct. *See Silver v. New York Stock Exch.*, 373 U.S. 341, 359-360 (1963); *Gordon*, 422 U.S. at 689-690; *Otter Tail Power Co. v. United States*, 410 U.S. 366, 372-375 (1973). The SEC even admitted that if the conduct alleged in the complaints was limited only to tie-in arrangements and laddering agreements, the agency "does not have before it, nor does it currently anticipate, any proposals that would permit that sort of conduct" and that "it is difficult to envision circumstances in which" the SEC would authorize this conduct. *See* App. 67a, 189a.

II. THE DECISION DOES NOT THREATEN CAPITAL RAISING

Like all Defendants facing the possibility of a large multibillion dollar lawsuit, Defendants beg the Court to take their Petition by arguing that unless this Court protects them and approves their illegal, injurious conduct, the sky will collapse and the world as we know it will end. In this case, Defendants argue that failure to reverse the Second Circuit's decision will result in the annihilation of the United States capital markets. Nothing could be farther from the truth.

The Second Circuit rendered its decision in 2005. In 2006, Goldman Sachs reported "record net revenues, net earnings and diluted earnings per common share for its first quarter ending February 14, 2006." *See* Form 8-K of the Goldman Sachs Group, Inc. dated March 14, 2006, available at www.goldmansachs.com/ our_firm/investor_relations/financial_reports/ docs/8k-1q2006.pdf. Goldman Sachs reported that "Investment Banking produced net revenues of 14.7 billion, its second best quarter and its best quarterly performance in six years." *Id.*

Similarly, Morgan Stanley reported that its investment banking division, now called Institutional Securities, "achieved record net revenues of $5.5 billion, up 36 percent from last year." *See* Morgan Stanley Press Release, dated March 22, 2006, available at www.morganstanley.com/about/ir/shareholder/1q2006.html. The gloom and doom prediction by the SEC and Defendants has not proven accurate; nor has the Second Circuit's opinion disrupted "capital formation in the United States" through fear of treble damages. (Cert. Pet. 28).

CONCLUSION

For the reasons stated in this memorandum of law, this Court should deny Defendants' Petition for Certiorari and allow the action to be remanded to the District Court.

Respectfully submitted,

RUSSEL H. BEATIE
BEATIE AND OSBORN LLP
521 Fifth Avenue
34th Floor
New York, New York 10175
(212) 888-9000

Attorneys for Respondent
Milton Pfeiffer

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In the Supreme Court of the United States

CREDIT SUISSE FIRST BOSTON LTD., ET AL.,

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REPLY TO BRIEF IN OPPOSITION FOR RESPONDENT MILTON PFEIFFER

ROBERT B. MCCAW
LOUIS R. COHEN
ALI M. STOEPPELWERTH
FRASER L. HUNTER, JR.
NOAH A. LEVINE
WILMER CUTLER PICKERING
HALE & DORR LLP
399 Park Avenue
New York, New York 10022
(212) 230-8800
Attorneys for Petitioner
Citigroup Global Markets Inc.

STEPHEN M. SHAPIRO
Counsel of Record
KENNETH S. GELLER
TIMOTHY S. BISHOP
MAYER, BROWN, ROWE &
MAW LLP
1909 K Street, N.W.
Washington, D.C. 20006
(202) 263-3000
Attorneys for Petitioner
Merrill Lynch, Pierce,
Fenner & Smith Incorporated

Counsel for Petitioners
[Additional Counsel Listed On Signature Page]

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REPLY TO BRIEF IN OPPOSITION FOR RESPONDENT MILTON PFEIFFER

This case consolidates two class actions that the Second Circuit held are not barred by implied immunity. Pet. App. 72a. One suit, *Billing*, alleges violations of the Sherman Act by investment banks resulting from their underwriting of some 900 technology-related IPOs during the market bubble of the late 1990s. The district court explained that the second class action, *Pfeiffer*, brought against investment banks and some of their institutional customers, challenges the "same practices" by labelling them as "commercial bribery" under the Robinson-Patman Act, 15 U.S.C. § 13(c). *Ibid.* In both cases the Second Circuit rejected the views of the SEC and district court and accepted the arguments of the Department of Justice on the dispositive issue of implied immunity. Plaintiffs in *Billing* have waived their response to the petition. This brief replies to the opposition in *Pfeiffer*.

Pfeiffer's perfunctory opposition does not come to grips with the compelling reasons for review set forth in the petition and amicus briefs submitted by the National Association of Securities Dealers, the New York Stock Exchange, and the Securities Industry Association. Congress placed self-regulatory organizations like the NASD and NYSE, which are overseen by the SEC, at "the front line of enforcing compliance" with the securities laws. Brief *Amicus Curiae* of NYSE at 6; Brief *Amicus Curiae* of NASD at 8. Both SROs have explained there is "an urgent need for this Court to grant certiorari" because these antitrust suits are "fundamentally inconsistent with the regulatory regime that Congress established when enacting the securities laws" and threaten the Nation's capital markets. NASD Br. 7; NYSE Br. 3-4, 13.

Nor does Pfeiffer seriously address the SEC's explanation of the need for immunity in this case (Pet. App. 124a-158a, 180a-198a), or the holdings in *NASD*, *Gordon*, and

Trinko. He offers no reason why this Court should deny review here when it granted review in *NASD* and *Gordon*, where the SEC likewise contended that immunity was necessary to preserve its regulatory authority, and the Department of Justice likewise disagreed. Nor does he explain how this case is less worthy of review than *Trinko* where, despite an antitrust savings clause, this Court recognized that antitrust suits would improperly disrupt a comprehensive scheme of regulation. Beyond this, he nowhere disputes petitioners' showing that the Second Circuit's ruling conflicts with decisions of several other circuits. Pet. 25-26.

As petitioners and amici have shown, this Court's intervention is essential to protect the securities regulatory regime, including not only the statutory authority of the SEC and the SROs that operate under its supervision, but also the stringent limitations that Congress has imposed on private securities actions in legislation such as the Private Securities Litigation Reform Act (PSLRA), which Pfeiffer seeks to bypass. Pfeiffer's contrary contentions are easily refuted.

1. Pfeiffer concedes (at 2) that the *Billing* plaintiffs attack the basic elements of the syndicate underwriting process which are essential to "the capital raising abilities of the United States financial markets." Pfeiffer asserts that "[h]is theory" is different, because he alleges underwriters "paid bribes to, or received bribes from" institutional investors "to inflate the price of the hot issue securities in the aftermarket," and therefore does not challenge "pre-offer underwriting activities." *Ibid.* In fact, Pfeiffer's "bribe" theory is just a rehash of the "tie-in" allegations in *Billing* dressed up in Robinson-Patman Act terminology. See Pet. App. 75a, 121a. Pfeiffer admits (at 2) that the Second Circuit "correctly" characterized his claims. In doing so, the court recounted Pfeiffer's allegations of "agreements" that IPO allocants would divide profits with underwriters by purchasing large quantities of IPO stock in the aftermarket and by paying "unusually large commissions" for transactions in "unrelated se-

curities" (Pet. App. 19a-20a)—agreements also alleged by the Sherman Act plaintiffs. See *id.* at 17a-18a. Pfeiffer simply adds allegations that underwriters allocating IPOs "favored long-term investors over 'flippers.'" *Id.* at 75a, 121a.

That Pfeiffer recharacterizes the *Billing* plaintiffs' "tie-ins" as "bribes" makes no difference to the certworthiness of his case. The communications that Pfeiffer portrays as agreements to buy in the aftermarket and to hold rather than "flip" shares occurred in the midst of heavily-regulated IPOs. The SEC has explained that IPO underwriters may legitimately inquire about a customer's intent to "be a long-term holder" instead of a "flipper," whether the customer expects to purchase more shares in the aftermarket to build a long-term position, and the price at which it might accumulate that position. See Pet. 3; Pet. App. 224a. Similarly, allegations that commissions are excessive fall squarely within the SEC's and NASD's statutory authority (see *Gordon*, 422 U.S. at 681-682), implicating rules that expressly permit an underwriter to allocate IPO shares to good customers who generate substantial commissions. See Pet. 8.

Thus, when the conduct Pfeiffer labels as paying and receiving "bribes" in the aftermarket is viewed in the context of the underwriting process to which the alleged agreements relate, the question whether a particular instance is legal will depend on exactly where that conduct falls under fine lines that are carefully drawn by expert regulators and "continual[ly] adjust[ed]" in light of changing conditions. Pet. App. 195a. An example of the complex nature of this line-drawing process is the recent decision of an NASD panel in *Department of Enforcement* v. *Invemed Associates*, No. CAF030014 (NASD Office of Hearing Officers Mar. 3, 2006). There, an NASD panel concluded in a 94-page opinion, following a 17-day hearing, that a member firm had not engaged in illegal profit sharing by accepting higher-than-normal commission rates on 700 trades from customers seeking allocations of "hot" IPOs. Painstakingly reviewing commission payments

and customer relationships, the panel concluded that rules promulgated under the securities laws do not prohibit underwriters from allocating IPO shares to good customers, that customers may voluntarily increase order flow and commission payments to increase their chances of obtaining allocations, and that no illicit agreements or "bribes" were involved. As petitioners and the SEC have shown and the SROs confirm, to have antitrust juries assess defendants' conduct under "competition first" principles would make "nuanced distinctions" of this sort a nullity, undermining the "comprehensive and carefully reticulated securities regulatory regime that—unlike the antitrust laws—promotes both competition and * * * market stability and capital formation." NASD Br. 7, 9; see NYSE Br. 13.

2. Pfeiffer's assertion (at 3-4) that the Second Circuit faithfully followed *Gordon*, creating no novel test for immunity, does not withstand scrutiny. To be sure, this Court looks to congressional intent to determine if immunity is proper. It has never, however, adopted anything like the narrow, multipart test for congressional intent applied by the court of appeals, requiring that Congress specifically immunized the exact practice at issue and empowered the SEC to compel that practice, that the SEC in fact permitted that practice, and that application of the antitrust laws would moot a provision of the securities laws. See Pet. 22-24; NASD Br. 6-7.

In *Gordon* this Court found immunity—as urged by the SEC and opposed by the Department of Justice—because Congress had granted to the SEC broad authority "to oversee the fixing of commission rates" and application of the antitrust laws would "render nugatory the legislative provision for regulatory agency supervision." 422 U.S. at 688, 691; see Pet. 20. The district court and the SEC correctly concluded that *Gordon* is directly applicable here, where Congress conferred on the SEC and SROs comprehensive authority to regulate all the practices alleged by plaintiffs and application of the antitrust laws would create the potential for conflicting

standards. See Pet. App. 86a, 193a; NASD Br. 13-17; NYSE Br. 12-13; see also *NASD*, 422 U.S. at 724-725, 735 (finding immunity where Congress empowered the SEC "flexibly" to address practices it believed were "detrimental," so that antitrust laws created the potential for "inconsistent standards"). Regulation of the IPO process and aftermarket conduct growing out of it lies at the heart of the SEC's authority under securities statutes this Court has described as the "ancho[r]" of "regulation of vital elements of our economy." *Merrill Lynch* v. *Dabit*, 126 S. Ct. 1503, 1509 (2006).

Tellingly, Pfeiffer does not so much as mention *Trinko*, which reaffirms that *Gordon* and *NASD* require immunity when there is a "real possibility of [antitrust] judgments conflicting with the agency's regulatory scheme." 540 U.S. at 406. In the face of a savings clause that barred immunity, *Trinko* nevertheless held that the antitrust laws should not be applied where a jury's judgments are likely to result in "[m]istaken inferences" and "false condemnations" that are costly and not outweighed by "the slight benefits of antitrust intervention" piled on top of other available "litigation routes"—factors that also support dismissal here. *Id.* at 406, 414; see *Dabit*, 126 S. Ct. at 1514 (permitting "parallel class actions" under "different standards" applied to the same facts is "wasteful" and "duplicative"); NASD Br. 15; HERBERT HOVENKAMP, THE ANTITRUST ENTERPRISE 237 (2005).

3. Pfeiffer's contention (at 4) that no deference is due the SEC's view that immunity is necessary here is riddled with errors. Pfeiffer concedes that courts "defer" to expert agencies charged by Congress with regulating the area in question. See *Gordon*, 422 U.S. at 689-690 (deferring to the SEC's view that immunity was necessary "[g]iven the expertise of the SEC" and "the confidence the Congress has placed in the agency"); *NASD*, 422 U.S. 694 (agreeing with SEC that immunity was required); Pet. 30. Pfeiffer's assertion that this Court should ignore the SEC's considered position because the SEC "always finds implied repeal" is wrong. The

SEC did not urge immunity in *Silver*, for example, where it lacked jurisdiction over the exchange rules at issue.

Pfeiffer's assertion (at 4) that *Silver* held there can be no immunity unless the SEC can "authorize or require" challenged conduct is also erroneous. Immunity was denied in *Silver* because the SEC lacked jurisdiction over exchange rules requiring removal of telephone connections to nonmembers so there was no "agency check" on the behavior at issue. 373 U.S. at 359-360. In *Gordon* and *Trinko*, even challenges to practices *forbidden* under the regulatory scheme (see 422 U.S. at 679-682, 540 U.S. at 405-406) were dismissed to give the agency sufficient room to regulate.

Pfeiffer's narrow focus on whether the SEC can permit or require conduct misses the significant practical issue here: empowering antitrust juries to determine what IPO conduct is unlawful would deter beneficial activities that the SEC does permit. See Pet. 9; Pet. App. 156a, 193a-194a, 197a. The SEC and NASD have punished conduct they believe crossed the line for permissible bookbuilding and IPO allocation practices. Pet. App. 137a-138a, 196a; NASD Br. 12. There is no reason to think that antitrust juries would draw the line under the Sherman or Robinson-Patman Act at the same place; accordingly, the threat of treble damages liability will make antitrust concerns "the predominant considerations in the underwriting process." Pet. App. 194a; see NYSE Br. 3, 13 (the threat of treble damages will impair the "ability of SROs and the SEC to develop finely calibrated regulatory responses for this rapidly-changing industry").

4. Contradicting Pfeiffer's assertion (at 5) that treble damages antitrust suits pose no threat to capital formation, the NASD, which has statutory responsibility to regulate the conduct of securities firms during IPOs under the close oversight of the SEC, has informed this Court that "pervasive litigation" and "crippling regulatory confusion" will result from the Second Circuit's ruling, undermining the NASD's and

the SEC's ability to regulate "in a manner that promotes market stability and capital formation" and "significantly disrupt[ing]" the securities market to the detriment of "the investments of millions of Americans." NASD Br. 2, 9. The SEC warned the courts below of the same adverse effects on the capital markets. Pet. App. 193a-197a (the fear of treble damages awards will "discourag[e]" conduct that "would serve the interests of the markets and the capital formation process," "distort[ing] market participant behavior in ways that are harmful to the overall securities markets").

That underwriters announced profits two months after the Second Circuit denied rehearing—a ruling that was stayed by the panel pending this Court's review—hardly contradicts the SEC's and NASD's conclusion that treble damages class actions are a matter of great concern. Opp. 5. Plaintiffs looking for uncompensated "insurance against market losses" naturally seek out perceived "deep pockets." *Dura Pharms.*, 125 S. Ct. at 1633. The risk of treble damages liability for massive stock market fluctuations will inevitably have the harmful effect securities regulators have identified and lead to blackmail settlements. In the wake of the Second Circuit's decision, new class action antitrust complaints have already been filed against the securities industry based on alleged omissions and misstatements in securities transactions—the undisputed province of the federal securities laws. See *Electronic Trading Group* v. *Banc of America Sec., et al.*, 06 CV 2859 (S.D.N.Y., complaint filed Apr. 12, 2006) (alleging conspiracy among numerous broker-dealers to collect concealed commission charges from short sellers, even though an SEC regulation addressed the practice and suit could have been filed under the securities laws).

Treble damages antitrust suits are particularly injurious in the securities area, because Congress in the PSLRA adopted reforms aimed at "abuses of the class-action vehicle in litigation involving nationally traded securities," including the "targeting of deep-pocket defendants" and extraction of "ex-

tortionate settlements." *Dabit*, 126 S. Ct. at 1510-1511. An antitrust suit is subject to none of the limitations on securities suits imposed in the PSLRA. And it bypasses Congress's prohibition on punitive awards by demanding massive treble damages recoveries. This Court recently rejected a "narrow reading" of the Securities Litigation Uniform Standards Act by the Second Circuit that "undercut the effectiveness" of the PSLRA. *Id.* at 1513. The Second Circuit's narrow interpretation of implied immunity law to allow plaintiffs to bypass the PSLRA's restrictions by recycling securities claims as antitrust violations should suffer the same fate. See *IPO Sec. Litig.*, 241 F. Supp. 2d 281 (S.D.N.Y. 2003) (securities fraud suits based on same conduct alleged by Pfeiffer); *Trinko*, 540 U.S. at 414 (dismissal required where "[j]udicial oversight under the Sherman Act would seem destined to distort investment and lead to a new layer of interminable litigation, atop the variety of litigation routes already available").

5. Immediate review is essential if the adverse consequences identified by petitioners, amici, and the SEC are to be averted. Absent review, district court judges in the Second Circuit—the center of both the securities and securities litigation industries—will reject implied immunity defenses presented in motions to dismiss, which cannot be appealed. Only by withstanding a trial on the merits—consuming tremendous resources, presenting enormous liability risks, and providing a usually irresistible incentive to settle—could a defendant again hope to bring the issue before this Court. The self-insulating nature of the Second Circuit's decision confirms that this is the time for the Court to review immunity issues critical to "the federal interest in protecting the integrity and efficient operation of the market for nationally traded securities." *Dabit*, 126 S. Ct. at 1509.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted.

ROBERT B. MCCAW
LOUIS R. COHEN
ALI M. STOEPPELWERTH
FRASER L. HUNTER, JR.
NOAH A. LEVINE
WILMER CUTLER PICKERING
HALE & DORR LLP
399 Park Avenue
New York, New York 10022
(212) 230-8800
Attorneys for Petitioner
Citigroup Global Markets
Inc.

ANDREW J. FRACKMAN
RICHARD G. PARKER
BRENDAN DOWD
O'MELVENY & MYERS LLP
Seven Times Square
New York, New York 10036
(212) 326-2000
Attorneys for Petitioner
Robertson Stephens, Inc.

A. ROBERT PIETRZAK
JOEL M. MITNICK
SIDLEY AUSTIN LLP
787 Seventh Avenue
New York, New York 10019
(212) 839-5300
Attorneys for Petitioner
Deutsche Bank Securities Inc.

RICHARD A. CIRILLO
KAREN R. KOWALSKI
KING & SPALDING LLP
1185 Avenue of the Americas
New York, New York 10036
(212) 556-2100
Attorneys for Petitioner
Credit Suisse First Boston LLC

STEPHEN M. SHAPIRO
Counsel of Record
KENNETH S. GELLER
TIMOTHY S. BISHOP
MAYER, BROWN, ROWE &
MAW LLP
1909 K Street, N.W.
Washington, D.C. 20006
(202) 263-3000
Attorneys for Petitioner
Merrill Lynch, Pierce,
Fenner & Smith Incorpo-
rated

ANDREW B. CLUBOK
RICHARD A. CORDRAY
BRANT W. BISHOP
STEVEN A. ENGEL
KIRKLAND & ELLIS LLP
655 15th Street, N.W.
Washington, D.C. 20005
(202) 879-5000
Attorneys for Petitioner
Morgan Stanley & Co. Inc.

SHEPARD GOLDFEIN
JAMES A. KEYTE
SKADDEN, ARPS, SLATE,
MEAGHER & FLOM LLP
Four Times Square
New York, New York 10036
(212) 735-3000
Attorneys for Petitioner
Janus Capital Management
LLC

MOSES SILVERMAN
PHILIP G. BARBER
PAUL, WEISS, RIFKIND,
WHARTON & GARRISON LLP
1285 Avenue of the Americas
New York, New York 10019
(212) 373-3000
Attorneys for Petitioner
Lehman Brothers Inc.

JON R. ROELLKE
JEFFREY H. DRICHTA
CLIFFORD CHANCE US LLP
2001 K Street, N.W.
Washington, D.C. 20006-1001
(202) 912-5000
Attorneys for Petitioner
Merrill Lynch, Pierce,
Fenner & Smith Incorporated

PAUL GONSON
GLENN R. REICHARDT
KIRKPATRICK & LOCKHART
NICHOLSON GRAHAM LLP
1601 K Street, N.W.
Washington, D.C. 20006
(202) 778-9000
Attorneys for Petitioner
Merrill Lynch, Pierce,
Fenner & Smith Incorporated

GANDOLFO V. DIBLASI
PENNY SHANE
DAVID M.J. REIN
RICHARD J.L. LOMUSCIO
SULLIVAN & CROMWELL LLP
125 Broad Street
New York, New York 10004
(212) 558-4000
Attorneys for Petitioners
The Goldman Sachs Group,
Inc. and Goldman, Sachs &
Co.

RANDY M. MASTRO
JOHN A. HERFORT
RICHARD FALEK
GIBSON, DUNN & CRUTCHER
LLP
200 Park Avenue
New York, New York 10166
(212) 351-4000
Attorneys for Petitioner
Bear, Stearns & Co., Inc.

STEVEN WOLOWITZ
MATTHEW INGBER
MAYER, BROWN, ROWE &
MAW LLP
1675 Broadway
New York, New York 10019
(212) 506-2500
Attorneys for Petitioner
Comerica, Inc.

GERALD J. FIELDS
KEVIN C. LOGUE
PAUL HASTINGS JANOFSKY
& WALKER LLP
75 East 55th Street
New York, New York 10022
(212) 318-6000
Attorneys for Petitioners
Van Wagoner Capital
Management, Inc. and Van
Wagoner Funds, Inc.

DAVID W. ICHEL
JAYMA M. MEYER
SIMPSON THACHER &
BARTLETT LLP
425 Lexington Avenue
New York, New York 10017
(212) 455-2000
Attorneys for Petitioner
J.P. Morgan Securities Inc.

JOHN D. DONOVAN, JR.
ROBERT G. JONES
ROPES & GRAY LLP
One International Place
Boston, Massachusetts 02110
(617) 951-7000
Attorneys for Petitioners
Fidelity Distributors Corp.,
Fidelity Brokerage Services
LLC, and Fidelity
Investments Institutional
Services Co., Inc.

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No. 05-1157

IN THE

Supreme Court of the United States

CREDIT SUISSE FIRST BOSTON LTD., *et al.*,

Petitioners,

v.

GLEN BILLING, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BILLING PLAINTIFFS' BRIEF IN OPPOSITION

CHRISTOPHER LOVELL
Counsel of Record
GARY S. JACOBSON
RYAN E. LONG
LOVELL STEWART
& HALEBIAN LLP
500 Fifth Avenue
New York, NY 10110
(212) 608-1900

(*Additional Counsel Listed on Signature Page*)

201447

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTION PRESENTED

Whether certiorari should be granted where the grounds therefor have been manufactured, and the unanimous decision of the court of appeals declining to imply antitrust immunity ("Decision") painstakingly quotes from and is fully consistent with the long-established precedent of this Court.

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Review of Antimanipulation Regulation of Securities Offerings, Securities Act Release No. 7057, Securities Exchange Act Release No. 33,924 (Apr. 25, 1994) . . . 16

In order to try to manufacture grounds for certiorari, Petitioners mischaracterize the Decision, this Court's implied antitrust immunity standard, and the conduct which plaintiffs allege to violate the antitrust laws.

Amici's professed concerns that they are left without meaningful standards of conduct should be ameliorated if their members refrain from conspiring to conduct themselves in a manner prohibited by the federal securities laws since their inception. *See* II *infra*.

I. THIS CASE IS SUBSTANTIVELY INAPPROPRIATE FOR CERTIORARI BECAUSE THE DECISION IS CONSISTENT WITH AND EXTENSIVELY QUOTES FROM THIS COURT'S PRECEDENT ON IMPLIED ANTITRUST IMMUNITY

In a series of decisions, this Court has developed a clear legal standard for implied antitrust immunity. *Nat'l Gerimedical Hosp. & Gerontology Ctr. v. Blue Cross of Kansas City*, 452 U.S. 378 (1981) ("*National Gerimedical*"); *Gordon v. New York Stock Exch.*, 422 U.S. 659 (1975) ("*Gordon*"); *United States v. National Association of Securities Dealers*, 422 U.S. 694 (1975) ("*NASD*"); *Otter Tail Power Co. v. United States*, 410 U.S. 366 (1973) ("*Otter Tail*"); *United States v. Philadelphia National Bank*, 374 U.S. 321 (1963) ("*Philadelphia National Bank*"); *Silver v. New York Stock Exchange*, 373 U.S. 341 (1963) ("*Silver*"); and *United States v. Borden Co.*, 308 U.S. 188 (1939) ("*Borden*").

In vacating and remanding for continued consideration of the pending motion to dismiss[1], the Decision explicitly quoted and faithfully followed this Court's foregoing decisions. *See* Appendix ("App.") at 24a-41a, 64a-71a. For one example, the Court quoted this Court's basic standard for implied as immunity as follows:

> The basic contours of implied antitrust immunity jurisprudence are well-established. The analysis begins

1. The Court of Appeals provided important guidance for the District Court's handling of the case on remand by repeatedly citing to this Court's decision in *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004) ("*Trinko*") (*see* App. at 41a, 58a, 60a) and other cases.

> with the 'cardinal principle of construction that repeals by implication are not favored.' *Silver* [*v. New York Stock Exchange*], 373 U.S. [341,] at 357, 83 S.Ct. 1246 [1963] (*quoting United States v. Borden Co.*, 308 U.S. 188, 198, 60 S.Ct. 182, 84 L.Ed. 181 (1939)); *see Gordon v. New York Stock Exch.*, 422 U.S. 659, 682, 95 S.Ct. 2598, 45 L.Ed.2d 463 (1975); *California v. Fed. Power Comm'n*, 369 U.S. 482, 485, 82 S.Ct. 901, 8 L.Ed.2d 54 (1962). 'The antitrust laws represent a "fundamental national economic policy,"' *Nat'l Gerimedical Hosp. & Gerontology Ctr. v. Blue Cross of Kansas City*, 452 U.S. 378, 388, 101 S.Ct. 2415, 69 L.Ed.2d 89 (1981) (*quoting Carnation Co. v. Pac. Westbound Conference*, 383 U.S. 213, 218, 86 S.Ct. 781, 15 L.Ed.2d 709 (1966)), and though, '[t]o be sure, where Congress did intend to repeal the antitrust laws, that intent governs, . . . this intent must be clear,' *id.* at 389, 101 S.Ct. 2415 (citations omitted). Implied immunity will be found only in the face of a 'plain repugnancy between the antitrust and regulatory provisions,' *Gordon*, 422 U.S. at 682, 95 S.Ct. 2598 (*quoting United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 350-51, 83 S.Ct. 1715, 10 L.Ed.2d 915 (1963)); *see Wood v. United States*, 41 U.S. (16 Pet.) 342, 363, 10 L.Ed. 987 (1842), only if the repeal is necessary to make the regulatory provisions work, *see Silver*, 373 U.S. at 357, 83 S.Ct. 1246, 'and even then only to the minimum extent necessary,' *id.* . . .

App. at 23a (citations and footnote omitted).

Petitioners conspicuously fail to quote or even mention the foregoing "plain repugnancy", "clear intent", and "minimum extent necessary to make the statute work" requirements of this Court's implied antitrust immunity standard. Petition, *passim*.

Because the "epic" conspiratorial conduct challenged here is prohibited by both the antitrust and the securities laws (*see* II *infra*), this case presents a situation of conceded past, present and foreseeable future **harmony** between the antitrust and regulatory statutes.

Only oxymoronically can past, present and future harmony between two statutes constitute this Court's expressly required "clear intent" of "plain repugnancy".[2]

Therefore, Petitioners must ignore essential elements of this Court's implied immunity standard, and reformulate such immunity standard to Petitioners' liking.

A. Because Petitioners' Four Novel Formulations Of This Court's Implied Immunity Standard Are Each Refuted By This Court's Precedent, Petitioners' Request For Certiorari Is Baseless

One problem with creating a new story instead of following the established standard is that you may get your story confused or vary it in retelling. Petitioners wind up offering four different immunity standards which they attribute to this Court. However, as the Decision demonstrated, each of these versions has previously been rejected by this Court.

Petitioners' first iteration of the immunity standard is as follows:

> immunity will be implied when either (i) Congress has given the SEC direct authority over the challenged conduct and the Commission has exercised that authority or (ii) the conduct at issue is subject to a pervasive regulatory scheme. In either case, immunity will be implied if application of the antitrust laws would conflict

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2. The Petitioners sought rehearing or rehearing *en banc* from the Second Circuit Court of Appeals. App. at 123a. Two panels of the Second Circuit had recently upheld Wall Street's claims for implied immunity where the challenged conduct was authorized by the SEC. *In re Stock Exchs. Options Trading Antitrust Litig.*, 317 F.3d 134 (2d Cir. 2003) (the SEC "has at times encouraged multiple listing [of equity options] and at times disapproved of that practice"); *Friedman v. Salomon/Smith Barney, Inc.*, 313 F.3d 796 (2d Cir. 2002) (SEC had long permitted flipping).

Perhaps due to the dramatically different fact situation here, Petitioners' request for rehearing was unanimously denied (without any necessity of a brief from plaintiffs), and no Judge requested that a vote be taken concerning *en banc* review. App. at 123a.

> with, rather than merely supplement, the relevant regulatory regime – a finding that is particularly likely where the SEC has sought to strike a balance between competition and other statutory objectives.

Pet. at 5 (citations omitted). This asserted formulation dumbs down "plain repugnancy", drops the "to the minimum extent necessary" limitation, and similarly omits the Congressional "intent must be clear" aspect of this Court's standard. However, Petitioners' first iteration at least retains a faint echo of the "plain repugnancy" requirement in its "conflict rather than supplement" language.

Petitioners' later effective formulations of the immunity standard drop the "conflict" requirement in favor of a mechanistic substitute:

> Given the SEC's comprehensive authority over syndicate underwriting and manipulative conduct, its exercise of that authority over the conduct alleged here through both rulemaking and enforcement, and its statutory mandate to weigh competition concerns, the requirements for immunity set forth in *Gordon* and *NASD* are satisfied . . .

Pet. at 18. Similarly, Petitioners drop the "conflict" requirement, as well as their own, above quoted "statutory mandate to weigh competition concerns" requirement in their third formulation:

> Congress conferred on the SEC 'direct regulatory power' to supervise syndicate underwriting and the sorts of conversations during that process that plaintiffs characterize as tie-ins[, and b]ecause the SEC exercised that power, *Gordon* and *NASD* require immunity so as not to disrupt the regulatory scheme.

Pet. at 23. Petitioners' fourth version of this Court's immunity standard is this:

> As the Court held in *Gordon*, 'where the agency both has the power to control [Petitioners'] conduct and actually exercises that power,' the antitrust laws are 'ousted'

> because of the potential for conflict with the securities regulatory regime. 1A Areeda & Hovenkamp, *supra*, ¶ 243a, at 36 & n.6. In *NASD*, where the record was clear that Congress had vested in the SEC authority to regulate and supervise the challenged conduct and the SEC confirmed that its authority 'w[ould] be compromised seriously' if the antitrust case were permitted to proceed, this Court concluded that implied repeal was necessary to make the regulatory scheme work. 422 U.S. at 729-730.

Pet. at 19. Petitioners' above description drops an important qualifier from what the Treatise actually said, and misstates *Gordon* and *NASD*. What Areeda and Hovenkamp actually say is that antitrust law will be applied to "define the limits of [discretionary] private behavior. By contrast, where the agency both has the power to control such conduct and actually exercises that power with some thoroughness, the antitrust laws *may be* completely ousted." 1A Phillip Areeda & Herbert Hovenkamp, Antitrust Law (2d ed. 2000) ¶ 243 at 36 (emphasis supplied).

Gordon concerned not the "potential for conflict," but the plain repugnancy of the long-exercised power of the Securities and Exchange Commission ("SEC") to "fix" commission rates with the Sherman Act's prohibition of price fixing. 422 U.S. at 690-91. Nor did this Court imply immunity in *NASD* on the strength of the SEC's assertion that its authority would be "seriously compromised"; rather, this Court found that there could be "no reconciliation of [the SEC's] authority" to permit restrictive agreements in the secondary market for mutual funds and "the Sherman Act's declaration that they are illegal per se." 422 U.S. at 729.

B. Petitioners' Formulations That Substitute Regulatory Power And Action For This Court's Immunity Test, Violate The Express Holdings Of This Court

In purporting to supplant the three requirements listed on p. 2 *supra* with "the authority to regulate and the exercise of that authority", Petitioners violate decades of this Court's

precedent holding that conduct is not impliedly immune from the antitrust laws merely by reason of the fact that it is regulated by an agency. App. at 26a (*quoting Philadelphia National Bank*, and *Otter Tail Power*); *see National Gerimedical*.

For example, in *Otter Tail, supra*, a power company asserted that because the Federal Power Commission had the authority to compel it to interconnect with other companies and supply power to them, it should by implication be immune from antitrust charges of refusal to deal. *See* App. at 28a-29a ; *Otter Tail*, 410 U.S. at 371-73. This Court disagreed, stating that "[a]ctivities which come under the jurisdiction of a regulatory agency nevertheless may be subject to scrutiny under the antitrust laws," and that nothing in the legislative history of the Federal Power Act revealed "a purpose to insulate electric power companies from the operation of the antitrust laws." App. at 29a; *Otter Tail*, 410 U.S. at 372, 374.

In *Philadelphia National Bank, supra*, the bank argued that the Bank Merger Act of 1940, which authorized the Comptroller of the Currency to approve bank mergers after considering "the probable effects of the proposed transaction on competition," impliedly immunized such a merger from antitrust scrutiny. 374 U.S. at 332; App. at 26a n.22. This Court held that even in the face of such agency review and consideration of "the effect of the transaction on competition (including any tendency toward monopoly)", 374 U.S. at 332 n.8, *see also* App. at 26a, Congress did not intend that the antitrust laws be impliedly repealed.

> Indeed, that there are so many direct public controls over unsound competitive practices in the industry refutes the argument that private controls of competition are necessary in the public interest and ought therefore to be immune from scrutiny under the antitrust laws.

374 U.S. at 352, App. at 28a.

As the Decision carefully explained, this Court's precedent has also refused to transform a statutory mandate to weigh

competition into an indicium of conflict. App. at 26a, 27a (citing to *Philadelphia National Bank*, where an express statutory mandate to give weight to competitive and other concerns, did not justify immunity).

On the basis of their glaringly incorrect formulation of this Court's immunity test, Petitioners argue that the Decision adopted a "novel" immunity standard which supposedly conflicts with this Court's immunity standard, warranting certiorari.

It is the Petition, not the Decision, which fails to quote and articulate this Court's legal standard, and which proposes a "novel" test (indeed, four "novel" tests). The Petition must be denied because its main ground for certiorari is non-existent.

C. Petitioners Mischaracterize The Court Of Appeals' Flexible Application Of This Court's Immunity Standard To The Facts Here

In a variation on their foregoing argument, Petitioners mischaracterize the Court of Appeals' **application** of the implied immunity standard to the unique facts here, as a new immunity standard.

1. The Decision's Non-Exclusive, Flexible Application Of This Court's Immunity Standard

In order to apply this Court's well-established legal standard to the *sui generis* facts of this case, the Court of Appeals summarized four, non-exclusive "interrelated insights" from *Gordon* and flexibly added a fifth "catch-all" consideration:

> That determination [whether to imply immunity here] is informed by considering (1) congressional intent as reflected in legislative history and a statute's structure; (2) the possibility for conflicting mandates; (3) the possibility that application of the antitrust laws would moot a regulatory provision; (4) the history of agency

> regulation of the anticompetitive conduct; and (5) any other evidence indicating that the statute implies a repeal.

App. at 47a (footnote and citations omitted). The Court of Appeals' broad-ranging and flexible application of the implied immunity standard noted that the absence of legislative history evidencing any congressional intent to immunize tie-in arrangements was "not determinative" of whether to imply immunity. App. at 64a.[3]

On the other hand, the Court noted that the facts of this case did not fall within *any* of the non-exclusive insights of *Gordon*.[4] Having thus determined that the facts failed to support *any* of the established "insights" **and that no other** indications of implied immunity were present, the Court found that there was no plain repugnancy here. Indeed, the Court correctly went further and described Petitioners' immunity defense as "in many ways, unlike any we have seen." App. at 70a; *see* Pt. II *infra* regarding the *sui generis* aspects of the "epic" conspiracy alleged here.

2. Petitioners' Attack On The Decision's Application Of This Court's Immunity Standard Is Ordinarily Not Grounds For Certiorari And, Moreover, Is Wholly Baseless

Petitioners argue that the Decision's foregoing analysis created a "restrictive, multi-factor standard for implied antitrust immunity." Pet. at 26.

Rule 10 of this Court warns that "[a] petition for writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." However, the Decision's discussion of the "*Gordon* insights" and "any other evidence" is hardly

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3. Equally clear from the Court of appeals' review of earlier cases was the fact that immunity has been implied in the absence of one or more of the "*Gordon* insights." App. at 42a-49a.

4. *Id.* at 64a-67a.

restrictive, is not a new standard, is correct, and merely guides a broad-ranging application of this Court's standard to the facts here.

Petitioners repeatedly distort the Decision by falsely asserting that it created some "novel test" which restricts the availability of implied immunity. Examples of such distortions abound:

- Petitioners assert that "the Court of Appeals held that there is implied immunity *only* if 'Congress contemplated the specific conduct and intended for the antitrust laws to be repealed' - a novel test that comes close to imposing the same showing required for express antitrust immunity." Pet. at 11 (emphasis supplied).

The insertion of the restrictive "only," of which Petitioners complain, is their own.[5]

- Petitioners assert that "the ruling below reduces the implied immunity doctrine to a dead letter - barely distinguishable from express immunity - *by requiring an overt statement of legislative intent on the very conduct at issue, as well as a finding that the SEC has the power to compel, and has actually permitted, that conduct.*" Pet. at 13 (emphasis supplied).
- Petitioners assert that the "Court of Appeals [held] that immunity *must* be premised on the SEC's ability to 'compel the anticompetitive conduct the antitrust laws would prohibit.'" Pet. at 22-23 (emphasis supplied) (citations omitted). *See also id.* at 25 ("No court has ever before held that the SEC must be able to compel an action under the securities laws before that action may be impliedly immune.")
- Petitioners assert that requirement of a "narrowly focused indication" of Congressional intent "would undermine the

5. The Court below actually said that, where "there is a potential specific conflict between the antitrust laws and a regulatory regime," it will imply immunity if it determines that Congress so intended, a determination to be informed by the four *Gordon* insights and a fifth consideration, "any other evidence indicating that the statute implies a repeal." App. at 57a.

> securities laws by immunizing, in a dynamic and rapidly evolving field, only that conduct specifically identified by Congress 70 years ago . . . . It is unreasonable to require Congress to express a view as to unforeseeable future circumstances in order for immunity to be implied." *Id.* at 24.

Offered in each instance without citation, Petitioners' assertions of what the Court "required" are false. The Court did not require "an overt statement of legislative intent on the very conduct at issue," or "a view as to unforeseeable future circumstances." Decision, *passim*. Rather, noting that legislative history contemplating immunity had been present in both *Gordon* and *NASD*, the Court of Appeals stated that its absence in this case was, of itself, "not determinative." App. at 64a.[6] Nor did the Court of Appeals hold (or otherwise state) that the agency "must" be able to "compel" the anticompetitive conduct for immunity to be implied.

- Petitioners assert that the Decision "required a history of 'SEC authorization – whether past or present – of the specific anticompetitive behavior.'" Pet. at 25.

No such requirement appears in the decision below. What the Court of Appeals actually said was that, in its search for "indication of congressional intent to repeal the antitrust laws and immunize IPO tie-in agreements," it considered the fact that in every securities case in which immunity was implied by this Court or by the Court of Appeals, the SEC had at some point authorized the specific anticompetitive behavior at issue. App. at 55a-56a.

- Petitioners' assert that the Decision established a "requirement that a defendant identify a particular

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6. Indeed, in its analysis of *Northeast Telephone Co. v. American Telephone & Telegraph Co.*, 651 F.2d 76 (2d Cir. 1981), a decision rejecting implied immunity as to which this Court denied certiorari, 455 U.S. 943 (1982), the Court below expressly noted that because the "protective couplers" at issue did not exist when the pertinent legislation was enacted, other indicia of legislative intent were necessary to imply immunity. App. at 42a-43a.

'provision, sentence, phrase, or word' of the securities laws that will be 'mooted' or significantly curtailed by applying the antitrust laws . . . .'" Pet. at 26, *quoting* App. at 65a-66a.

The Court of Appeals required no such thing. The quoted language is distorted from the Decision's observation that, in its application of the established legal standard to the facts, it found no interference whatsoever with any aspect of the securities regulatory regime from application of the antitrust laws. App. 65a-67a.

The radical nature of Petitioners' argument is apparent in that, when "conflict" (let alone "plain repugnancy") between the antitrust laws and the regulatory regime is removed from the implied immunity determination, Congressional intent is also eliminated from consideration. No decision of this Court even hints at condoning such a result in determining whether to apply the disfavored (*Silver* at 357) defense of implied immunity. Petitioners' distortions further demonstrate that certiorari is wholly unsupported here.

II. FACTUALLY, THE UNIQUE PROFILE OF THIS CASE IS INAPPROPRIATE FOR CERTIORARI

No case has ever found implied antitrust immunity in the unique profile that is presented by the "epic" conspiracy alleged here: it is sufficiently reprehensible that (a) it is prohibited by the antitrust laws, and (b) such conduct also has always been, is and will in any foreseeable future be prohibited by the subsequent regulatory statute, here, the securities laws. *See* B *infra*.

A. The "Epic" Horizontal Conspiracy Of Underwriters To Inflate Underwriting Charges And Prices, Violates The Sherman Act

The Sherman Antitrust Act, 15 U.S.C. § 1 *et seq.* ("Sherman Act"), is the fundamental commercial legislation of the United States, *National Gerimedical*, 452 U.S. at 389, and the Magna Carta of free enterprise. *Trinko*, 540 U.S. at

415-416 (*citing United States v. Topco Associates, Inc.*, 405 U.S. 596, 610 (1972)).

Section 1 of the Sherman Act prohibits agreements in restraint of trade. Where firms conspire to inflate their charges for services[7] or inflate market prices[8], they violate Section 1 of the Sherman Act.

In their Consolidated Complaint, Respondents alleged that, in violation of Section 1 of the Sherman Act, the ten largest investment banks conspired to require from customers tie-in consideration (the "anti-competitive charges") for allocations of shares of certain initial public offerings ("IPOs") and to inflate the aftermarket prices of those securities above the IPO price. Consolidated Amended Class Action Complaint ("C"), ¶¶ 1, 4(b).

The anticompetitive effects of Petitioners' "epic" conspiracy included (1) causing customers to have to pay to the defendant banks an additional tie-in charge to obtain certain IPO shares (C ¶¶ 1, 70); (2) penalizing and forcing

7. *See, e.g., In re Nasdaq Market-Makers Antitrust Litig.*, 894 F.Supp.703 (S.D.N.Y. 1995) (upholding allegations of Section 1 conspiracy to inflate the charge for market making services); *In re Public Offering Fee Antitrust Litig.*, 2004 WL 350696 (S.D.N.Y. Feb. 25, 2004) (upholding Section 1 claim that the same investment banks that are Petitioners here, inflated their underwriting charge for certain offerings).

8. *See Strobl v. New York Mercantile Exch.*, 768 F.2d 22 (2d Cir. 1985) (upholding jury verdict that defendants conspired to deflate prices on commodity exchange); *United States v. Salomon Bros., Inc.*, 57 Fed. Reg. 29,743 (1992) (settling charges that defendants conspired to amass substantial positions (reaching 100%) in the May 1991 Treasury Note in order to inflate prices; Salomon Brothers paid $290 million, including $100 million to the DOJ and the SEC, $55 million to the DOJ's asset forfeiture fund, and $100 million to a victim compensation fund); *United States v. Steinhardt Management Co. & Caxton Corp.*, 1995 WL 10627 (DOJ Notice, Jan. 13, 1995) (charging two investment fund managers with agreeing to acquire control of the April 1991 Treasury Note in order to create an artificial supply shortage designed to extract the highest price from buyers in the "secondary market," in both cash and repurchase transactions); *Three Crown Ltd. Partnership v. Salomon Bros., Inc.*, 1995 WL 422467 (S.D.N.Y. July 14, 1995) (alleging a similar conspiracy among Steinhardt, Caxton and Salomon to restrain trade in the April and May 1991 Treasury Notes).

other underwriters to impose such extra charge and to abide by the dominant investment banks' agreement (*id.*, ¶ 58); and (3) enabling Petitioners to increase their market share from 71% to 90% during the Class Period. *Id.*, ¶ 38.

In addition, another intended anticompetitive effect of the alleged "epic" conspiracy was to place in Petitioners' hands customer aftermarket orders to buy at escalating prices above the IPO price in each of the eight hundred-plus IPOs at issue here. *Id.* ¶ 4(b), 7. With these orders, Petitioners' alleged conspiracy inflated the aftermarket price spectacularly above the IPO price. *Id.* ¶ 8.

Thus, the Decision found:

> Plaintiffs allege an epic Wall Street conspiracy . . . Plaintiffs tell a compelling story and are not the first to tell it.

App., 1a-2a (listing SEC prosecutions and civil suits alleging that laddering and the tie-in agreements constitute securities law violations). The more that this "epic" conspiracy could use the laddered orders to raise the aftermarket prices **above the IPO price**, the greater the anticompetitive, tie-in charge that Petitioners' conspiracy could allegedly extract from customers[9] (*Id.* ¶¶ 42, 73, 74).

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9. Petitioners' collusive manipulation of orders, bids and prices **as a means** to inflate their charges, reprises these same Petitioners' manipulation of their bids, offers and prices in *Nasdaq*, 187 F.R.D. 466 (S.D.N.Y. 1998); and *U.S. v. Alex Brown & Sons, Inc.*, 963 F. Supp. 235 (S.D.N.Y), *aff'd*, 153 F.3d 16 (2d Cir. 1998).

In *Nasdaq* and *Alex Brown*, these same Petitioners allegedly manipulated their bids and offers in the aftermarket in a manner that widened the so-called "spread". *Nasdaq* at 470-71; *Alex Brown* at 239. The "spread" was the difference between "the bid" and "the ask", and was a prime determinant of the market-making income of the alleged conspirators. *In re Nasdaq Market-Makers Antitrust Litig.*, 894 F. Supp. 703, 707 n. 4 (S.D.N.Y. 1995).

The alleged intentional manipulation of Petitioners' bids, offers and prices so as to widen the spread, constituted price fixing in violation of

(Cont'd)

This enabled Petitioners' conspiracy to extract substantial anticompetitive charges from customers and inflate Petitioners' collusive, anticompetitive charges and revenues at the expense of plaintiffs and the proposed class. C ¶¶ 8, 43, 52; 67, 43 and 72.

B. Congress Also Prohibited The Challenged Conduct Here In The Federal Securities Laws

In response to the questions from the Court of Appeals, the SEC stated: "The federal securities laws and the Commission's regulations generally prohibit market manipulation, including the types of tie-in and laddering agreements alleged in the complaint in these actions." SEC's March 21, 2005 Letter to Court of Appeals, App. at 188a-189a.

Similarly, the SEC has expressly recognized that Congress has "always" statutorily prohibited in Section 17(a) of the Securities Act of 1933, 15 U.S.C. § 77a *et seq.*, tying the award of offered shares to additional commissions or other consideration, SEC Release 33-8851 (Dec. 9, 2004) at p. 15.

(Cont'd)

Section 1 of the Sherman Act. *In re Nasdaq Market-Makers Antitrust Litig.*, 894 F. Supp. at 712-713.

Just as these same Petitioners' alleged conspiracy in *Nasdaq* profited by creating an overall wide spread to increase Petitioners' effective charge to customers, so Petitioners' alleged conspiracy here profited by creating a wide spread between the IPO price and the immediate aftermarket prices to increase the Petitioners' anticompetitive underwriting charge to their customers. C ¶¶ 1, 6, 7, 42, 62.

The parallel antitrust and securities law prosecutions present here are not at all unprecedented. *Compare Nasdaq with In the Matter of Certain Market Making Activities on the NASDAQ*, Exchange Act Re. No. 34-40900, 1998 WL 919673 (Jan. 11, 1999) (SEC prosecution of wrongdoing similar to that in the antitrust case); *see* fn 8 (parallel prosecutions in Salomon Brothers' Treasury bid rigging); *see* App. 206a at fn 6 (listing DOJ and SEC parallel investigations).

Thus, the SEC has repeatedly found, and courts have repeatedly held, that Section 17(a) of the Securities Act statutorily prohibits an underwriter from (a) requiring laddering or tie-ins; (b) manipulating prices above the IPO price; and (c) extracting other compensation as consideration for the allocation of IPOs or as a means to share in the profits of manipulation. *E.g., In the Matter of The Stuart James Co., Inc.*, [1992-93 Transfer Binder] Fed.Sec.L.Rep. (CCH) ¶ 85,129 at 84,089 (Mar. 17, 1993) (underwriter violates Section 17(a) by requiring laddering and tie-in agreements, and manipulating prices); *SEC v. Beres Indus., Inc.*, 90 Civ. 3260 (JCL) (D.N.J.), Litigation Release No. 12575, 46 S.E.C. Docket 1386, 1990 WL 311990 (Aug. 9, 1990) (payment of excessive underwriter's compensation in connection with manipulation of IPO aftermarket price violates Section 17(a)); *See also In the Matter of Graystone Nash, Inc. (Dennis M.)*, SEC News Release, 1995 WL 471112 (Aug. 10, 1995) (underwriter sanctioned for violations of Section 17(a) of the Securities Act and Section 15(c) of the Exchange Act for conditioning IPO allocations to "aftermarket common stock sales in certain ratios to sales of units in the offerings, and allocation of common stock to be sold in the aftermarkets at increasing artificial 'tick' prices," resulting in misleading disclosures with respect to the offering, the distribution and the underwriter's compensation).

Because the federal securities laws have "always" statutorily prohibited tie-ins and laddering, those practices were historically limited to bucket shops or marginal broker dealers with relatively much to gain from successful manipulation and relatively little reputation or capital to lose from successful prosecution. *See* cases collected *supra*.[10]

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10. Also, Section 9(a)(2) of the Securities Exchange Act, 15 U.S.C. § 78i(a)(2), prohibits individual or concerted efforts to "raise" prices, and is the "heart" of the Securities Exchange Act according to the SEC and (Cont'd)

However, between 1997 and 2000, the statutorily prohibited, reprehensible practice of laddering and tie-in agreements morphed from the shady margins of Wall Street to the jointly-imposed requirement of the ten leading investment banks, *i.e.*, the Petitioners.

C. Petitioners Cite To No Case, And Respondents Know Of No Case, Finding Implied Immunity Where The Challenged Conduct Is Statutorily Prohibited By Both The Antitrust Laws And The Regulatory Statute

In other cases finding implied immunity, the regulatory agency has compelled or authorized the conduct alleged to violate the antitrust laws. *E.g.*, *Gordon*, 422 U.S. at 659, 666 (Congress expressly permitted the SEC to fix and insure 'reasonable' rates" under Section 19(b) of the Securities Exchange Act, 15 U.S.C. § 78a *et seq*, and the SEC expressly approved such rates); *NASD*, 422 U.S. at 727-28 (Congress, by enacting Section 22(f) of the Investment Company Act, found that the "two-price" system, "boot leg" competitors and other aspects of competition in the resale market for mutual fund shares harmed and were likely to harm customers).

In *Philadelphia National Bank*, *Otter Tail*, *Borden* and *Silver*, *supra*, the regulator had **not** compelled or authorized

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(Cont'd)

commentators. *See, e.g.*, Review of Antimanipulation Regulation of Securities Offerings, Securities Act Release No. 7057, Securities Exchange Act Release No. 33,924 (Apr. 25, 1994) 59 Fed. Reg. 21,681, 21,694 (April 26, 1994).

The deliberate "raising" of the price of a security above the IPO price alleged here, is the "raising" of prices prohibited by Section 9(a)(2)-(5). *In the Matter of L.T. Lawrence & Co., Inc.*, 72 S.E.C. Docket 2199, 2000 WL 1013563 (July 24, 2000) (violations of Section 17(a) of the Securities Act and Section 9(a)(2) of the Exchange Act for manipulation of aftermarket for various IPOs); *SEC v. Covington Bros. Tech.*, 80 Civ. 6826 (S.D.N.Y.) (CWP); Litigation Release No. 9253, 1980 WL 22131 (Dec. 5, 1980) (violations of Sections 17(a) of the Securities Act and Section 9(a)(2) of the Exchange Act for manipulation of aftermarket for IPO); *Stella v. Kaiser*, 82 F. Supp. 301, 309-10 (S.D.N.Y. 1948) (manipulation of market for purpose of inducing purchase of shares of new issue).

the conduct alleged to violate the antitrust laws, and this Court's implied immunity standard was not satisfied.

Accordingly, the Decision correctly found that Petitioners' argument for immunity here is "in many ways, unlike any we have seen". App. at 70a. Implicitly recognizing as much, Petitioners mischaracterize the complaint in ways that the Decision rejects and that defy common sense. *See* Point D *infra*.

D. Petitioners Incorrectly Assert That Various Conduct Which Demonstrates Defendants' Opportunity To Conspire, Is Itself Alleged To Be Unlawful

Rule 15 of this Court requires identification of misstatements in the Petition. Petitioners seek certiorari based on one such misstatement which is the following. Petitioners pretend that the alleged evidentiary allegations of Petitioners' opportunity to conspire – underwriting syndicates, road shows, and other joint communications and joint conduct – are alleged to be unlawful or challenged here. Petition pp. 2-3. Petitioners then mention that the complaint "also" alleges that "defendant underwriters conspired to require" tie in and laddering agreements. Petition p. 4.

1. As The Decision Below Found, What The Petition Mischaracterizes As The Challenged Conduct Is Merely The Allegation Of Numerous Evidentiary Circumstances Alleging That The Petitioners Had The Opportunity To Conspire

In truth, Respondents do not allege to be unlawful or otherwise challenge underwriting syndicates, "firm commitment" underwriting, voluntary associations, etc. Thus, Petitioners' mischaracterization of the complaint was rejected by the Decision below. App. 61a fn 47 (criticizing defendants' argument as the never-accepted argument that "implied immunity should apply whenever the evidentiary

basis for an antitrust claim includes legitimate activity"). Apparently every Judge in the Second Circuit also rejected this mischaracterization which was a basis for rehearing *en banc* below. *See* fn 2 *supra*.

Instead, Respondents solely allege to be unlawful Petitioners' conspiracy to inflate underwriting charges and prices by requiring tie-in and laddering agreements. C ¶¶1-4. Respondents allege, in effect, that Petitioners formed a daisy chain of communication, communicated with one another in many contexts, and thereby had the opportunity to form, refine and carry out their epic conspiracy. If Respondents do not prove the conspiracy to require tie-in and laddering, then they fail to prove their Section 1 claim.

2. No Complaints Have Been Filed Challenging Wall Street's Everyday Conduct

Because, contrary to Petitioners' mischaracterizations, plaintiffs do **not** challenge everyday practices on Wall Street, no complaints against such conduct have been filed during the five plus years since this action was commenced. Clearly, plaintiffs allege to be unlawful only the *sui generis* conduct from the relic or time capsule of the "epic" conspiracy that allegedly existed between March 9, 1997 and December 6, 2000. C ¶25.

III. THIS CASE IS PROCEDURALLY, DECISIONALLY AND FACTUALLY INAPPROPRIATE FOR *CERTIORARI* UNDER *TRINKO* AND *GORDON*

A. Four-Fifths Of The Motion To Dismiss Here Still Has Not Been Considered By Any Court, And These Grounds Which Are As Yet Unconsidered Here Were The Basis Of This Court's Decision In *Trinko*

Petitioners cobble together their argument for certiorari from parts of *Gordon* and *Trinko*, *supra*. However, comparisons of this case to those cases illustrate important procedural, decisional and strategic reasons why certiorari was appropriate in those cases but must be denied here.

The motion to dismiss had been fully considered and decided in *Trinko*. *See Trinko*, 123 F. Supp. 2d 738 (S.D.N.Y. 2000), *affirmed in part, vacated in part*, 305 F.3d 89 (2d Cir. 2002), *reversed and remanded*, 540 U.S. 398 (2004).

In contrast, here, four-fifths of the pending motion to dismiss has still not been considered by any of the Courts below.[11] It is precisely the as yet unconsidered grounds of the motion to dismiss here which formed the basis, in *Trinko*, for this Court's decision (failure to plead a claim) and for the concurring opinion (lack of standing to sue). 540 U.S. at 410-11 and 416-17.

Although Petitioners rely heavily on *Trinko* in their arguments for certiorari, the far more advanced procedural status in *Trinko* demonstrates the inappropriateness of certiorari here. *Id.* Further, *Trinko* actually rejected implied immunity. 540 U.S. at 406.

B. The Novel Claim In *Trinko* Was Based On Benign Conduct Permitted By The Sherman Act And Mandated By The Regulatory Statute Whereas The Claim Here Is Based On Conduct Prohibited Not Only By The Sherman Act But The Regulatory Statute As Well

In essence, the plaintiffs in *Trinko* wanted to create a novel antitrust monopoly claim based on the Petitioners' alleged failure to provide sufficient aid to its own competitors. 540 U.S. at 411. Thus, competing with one's

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11. In their response to the consolidated complaint, the Petitioners moved to dismiss pursuant to F.R.C.P. Rule 12(b)(6) for (1) the affirmative defense of antitrust immunity; (2) lack of standing; (3) failure to state a conspiracy claim; (4) pre-emption of state law antitrust claims; and (5) failure to allege a relevant market.

The District Court, the Honorable William Pauley, considered only the implied immunity affirmative defense, and dismissed on that ground. The District Court reasoned that, if the federal antitrust claims were barred, the state law antitrust claims were barred as well. Neither the District Court nor the Court of Appeals expressed any consideration of the other four grounds of dismissal.

competitors – conduct that was previously encouraged by the antitrust laws – was challenged in *Trinko*. *Id.*

This Court reasoned in *Trinko*:

> (a) that The Sherman Act is indeed the "Magna Carta" of free enterprise", *United States v. Topco Associates, Inc.*, 405 U.S. 596, 610, 92 S. Ct. 1126, 31 L.Ed.2d 515 (1972). 540 U.S. at 415-416;
>
> (b) but "we do not believe that traditional antitrust principles justify adding the present case to the few existing exceptions from the proposition that there is no duty to aid competitors". 540 U.S. at 411; and
>
> (c) that the duties imposed on incumbent local exchange carriers ("LEC") by the Telecommunications Act did not justify a modification of traditional (no duty to aid competitors) principles in part because Congress expressly provided that "nothing in this Act or the amendments made by the Act shall be construed to **modify** . . . the antitrust laws". [emphasis supplied] (*Id.* 406).

Accordingly, in *Trinko*, the conduct alleged to constitute a Section 2 violation was **permitted** under traditional antitrust principles. Pleading alchemy designed to re-jigger that conduct into an antitrust violation was rejected for failure to state a claim. And the denial of implied immunity was upheld. *Id.*

C. In *Gordon*, The Conduct Was Mandated By Rule And, Therefore, Not Conspiratorial At All

In *Gordon*, for decades, brokerage firms did not conspire to set their brokerage omissions because the New York Stock Exchange itself fixed the commissions. *Gordon* at 662. Thus, the brokers engaged in the benign conduct of complying with an Exchange rule.

Clearly, the reprehensible conduct alleged here is much worse than that which this Court rescued with certiorari in *Trinko* and *Gordon*. There is absolutely no need for this busy

Court to rescue the reprehensible conduct here. On the contrary, Petitioners should be left to shift for themselves.

IV. BECAUSE THERE HAVE BEEN NO FURTHER LAWSUITS, NO ALLEGED RECURRENCE OF THE "EPIC" CONSPIRACY, AND NO DOJ OR SEC REQUEST FOR *CERTIORARI*, MANY FACTORS THAT JUSTIFIED *CERTIORARI* IN PRIOR SUITS ARE WHOLLY ABSENT HERE

The conduct challenged here consists of a *sui generis*, non-recurring "epic" conspiracy. App. at 1a. Thus:

- in the five-plus years since this action was filed, not one further antitrust complaint challenging the reprehensible (but non-recurring) conduct here has been filed, and
- the DOJ and the SEC have refrained (a) from filing a brief concerning certiorari here, and (b) from voluntarily filing any amicus briefs below. Instead, the DOJ and SEC merely responded to requests from the Courts below.

In contrast, in *Gordon* , the challenged conduct affected everyone who transacted on the New York Stock Exchange, and spawned dozens of different cases as well as decisions of different Circuit Courts over almost a decade. *See, e.g., Thill Securities Corporation v. New York Stock Exchange*, 633 F.2d 65, 68 (7th Cir. 1980); *Kaplan v. Lehman Bros.*, 389 U.S. 954, 954 - 56 (1967). Although this Court, in an era of substantially fewer petitions for certiorari, initially denied the certiorari petitions concerning the challenged conduct at issue in *Gordon*, it ultimately did grant the petition. *Compare, Kaplan, supra*, 389 U.S. at 954 - 56 (Warren, C.J., dissenting) *with* 419 U.S. 1018 (1974).

The challenged conduct here is a *sui generis* relic from the time capsule of Petitioners' reprehensible but non-recurring alleged "epic" conspiracy. Therefore, important reasons for granting *certiorari* in *Gordon* — the frequent litigation reason, the strongly expressed governmental

interest reason, and the widespread, on-going conduct reason – are all wholly absent here.

V. THE DECISION QUOTES FROM AND IS FULLY CONSISTENT WITH THIS COURT'S "PERVASIVE REGULATION" ANTITRUST IMMUNITY DECISIONS IN *NATIONAL GERIMEDICAL* AND *NASD*

With regard to the "pervasive regulation" form of antitrust immunity, the Decision below again painstakingly cited to and painstakingly quoted from this Court's prior authority. *E.g.*, App. at 67a-70a.

A. Petitioner's Misquotes And Incorrect Criticisms Do Not Present Grounds For Certiorari

Arguing that immunity should be implied here because "the conduct at issue is subject to a pervasive regulatory scheme," Pet. at 5, Petitioners erroneously assert that the Decision "suggested that [pervasive regulation] may apply only 'where the activities of an SRO, extensively regulated by the SEC, are challenged as anticompetitive,' which is not the case here." Pet. at 11. Petitioners then argue that the Court below misconstrued *NASD* as "immuniz[ing] only 'association activities approved by the SEC' [and] turn[ing] on the 'special status' of the NASD as an SRO." Pet. at 21.

First, the Court below never stated or "suggested" that pervasiveness of regulation could immunize "only" SRO conduct. Rather, the Decision stated that "[t]he *primary illustration* of possible pervasive regulation is the situation where the activities of an SRO, extensively regulated by the SEC, are challenged as anticompetitive." App. at 50a (emphasis supplied).

Nor did the Court view *NASD* as immunizing only association activities or turning on SRO status. What the Court of Appeals actually said was that *NASD* involved two considerations: "one arising directly from the particular 'pervasive' regulatory relationship between the SEC and

the NASD . . . and the other arising derivatively from the 'fatal,' 'close relationship' between the alleged conspiracy and conduct the Court had already concluded was not only impliedly immune but actively encouraged by the SEC." App. at 68a (citations omitted). Distinguishing the facts here from those in *NASD*, the Court of Appeals stated that "[p]ervasive immunity of the second, derivative sort is impossible here, as the securities statutes do not specifically immunize the underlying tie-in arrangements." *Id.* It then considered "whether the regulations here are 'pervasive' like the SEC's regulations of the NASD were held to be in *NASD*." *Id.*

Once again, the Court of Appeals found this case factually distinguishable from *NASD*, since unlike Petitioners, the NASD "itself serves as a semi-private regulator over the complex and unique securities industry but does so under the ever-watchful and omnipresent eye of the SEC . . . . [such] that the decisions of the regulated (*i.e.*, the NASD) could be seen as the acts of the regulator." *Id.* The pervasiveness of the regulation in *NASD* was manifested through the SEC's ultimate authority over the NASD's own actions as a regulator. Thus, the Decision concluded that while Petitioners' conduct "may be subject to regulation and control by the SEC in great detail, that does not mean that the SEC approved those acts as it did in *NASD*." *Id.* at 68a-69a.

The Court of Appeals neither misread *NASD* nor created any conflict with other Circuit court decisions[12] in thus factually distinguishing *NASD* from this case. Further, the facts here present a far stronger case against immunity than the non-profit conduct challenged in *National* Gerimedical, but this Court rejected implied immunity in that case.

The Decision is fully consistent with this Court's prior precedent and certiorari is wholly unwarranted.

12. *E.g., Austin Mun. Sec. v. National Ass'n of Sec. Dealers*, 757 F.2d 676 (5th Cir. 1985) (NASD disciplinary procedures impliedly immune as subject to pervasive SEC oversight and authority in promulgation and enforcement); *Thill Sec. Corp. v. New York Stock Exch.*, 633 F.2d 65 (7th Cir. 1980) (former Exchange rule forbidding sharing of commissions with non-members immune as consistently treated as component of fixed-commission rate system subject to SEC review and approval); *Harding v. American Stock Exch.*, 527 F.2d 1366 (5th Cir. 1976) (disciplinary rules immune as long approved subject to pervasive SEC regulation).

B. Antitrust And Restraint Of Trade Prosecutions Of Conduct Occurring In The Securities Markets Have Been Well Publicized For A Century But Congress Continues To Include A Savings Clause In The Federal Securities Laws

Beginning before their federal statutory incarnation, the antitrust and restraint of trade laws have been applied to conduct on securities exchanges (*Silver*) and commodity exchanges,[13] conduct involving the manipulation (*see* cases collected in fn. 8 *supra*) of securities prices,[14] collusive conduct by brokers to inflate their market-making charges for aftermarket of trading (*see* cases collected in fn. 7), or their underwriting charges for specified types of initial public offerings,[15] and conduct by investment banks to boycott or to divide markets. *Dillard v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 961 F.2d 1148 (5th Cir. 1992) (antitrust immunity denied for boycott claim alleging that several brokerage firms had violated Section 1 of the Sherman Act by offering services in contracts that contained the same mandatory arbitration clause); *United States v. Morgan*, 118 F. Supp. 621 (S.D.N.Y. 1953) (epic decision finding that U.S. failed to prove that leading investment banks agreed to refrain from competition for customers and to divide markets).

Despite these repeated antitrust prosecutions and the considerable publicity concerning same, Congress has not exempted conduct in the securities markets from the antitrust laws. Rather, in enacting, re-enacting, and amending the federal securities laws for seventy-plus years,

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13. *United States v. Patten*, 226 U.S. 525, 335 S.Ct. 141 (1913); *Board of Trade of City of Chicago v. Christie Grain & Stock Co.*, 198 U.S. 236, 25 S.Ct. 637 (1905); *Strobl v. N.Y. Merc. Exch.*, 768 F.2d 22 (2d Cirl 1985).

14. *Livermore v. Bushnell*, 12 N.Y. Sup. Ct. (5 Hun.) 285 (1885) (condemning and enjoining agreement to inflate stock prices as an unlawful restraint of trade).

15. *In re Public Offering Fee Antitrust Litig.*, 2004 WL 350696 (S.D.N.Y. Feb. 25, 2004).

Congress has (with one exception for certain class actions arising under state law) retained one constant:

> the rights and remedies provided . . . shall be in addition to any and all other rights and remedies that may exist at law or in equity.

Securities Act § 16(a), 15 U.S.C. § 77p(a); *see also* Securities Exchange Act § 78(a), 15 U.S.C. § 78bb(a) (similar savings clause).

Congressional intent to "pervasively regulate" the securities markets is contraindicated by Congress' repeated inclusion of a clause "saving" investors' well-established, highly-publicized rights and remedies under, among other laws, the federal antitrust laws.

VI. THE DECISION IS CONSISTENT WITH OTHER CIRCUITS' IMPLIED ANTITRUST IMMUNITY DECISIONS

Buried in their Petition, Petitioners briefly argue that specified Circuit Courts have articulated different antitrust immunity criteria from the Decision's. Petition pp. 25 - 26. But the decisions cited by Petitioners have quoted or articulated the same criteria as is quoted from the Decision at pp. 1-2 hereof. *Austin Municipal Securities Inc. v. National Association of Securities Dealers*, 757 F.2d 676, 694 (5th Cir. 1985) ("Implicit repeal of the antitrust laws is not favored, and is justified only by a clear showing of repugnancy between the antitrust laws and the regulatory system.") (citations omitted); *Thill Securities Corporation v. New York Stock Exchange*, 633 F.2d 65, 68 - 69 (7th Cir. 1980) ("The test to be applied, the Court held, was 'whether implied repeal of the antitrust laws is necessary to make the Exchange Act provisions work[.]'") (*citing Gordon*, 422 U.S. at 686); *Harding v. American Stock Exchange, Inc.*, 527 F.2d 1366, 1370 (5th Cir. 1976) ("Immunity under the Sherman Act is necessary in this case to make the Exchange Act viable.").

The Decision is wholly consistent with the decisions of other circuits, and expressly cited to *Austin* and *Harding*.

VII. THE PROSECUTION OF PRIOR ANTITRUST CLAIMS AGAINST CONDUCT IN THE SECURITIES MARKETS HAS CONSISTENTLY PROMOTED PUBLIC TRUST IN THE MARKETS AND CAPITAL RAISING

A. Antitrust Claims Have Produced Untold Billions Of Dollars In Investor Savings

One key to capital raising is investor trust and confidence in the markets. Far from "chilling" capital raising, prior antitrust prosecutions have saved investors billions of dollars and had beneficial effects upon investors' trust in the securities markets. For example, after the filing of the *Nasdaq* antitrust claims by dozens of investors (*see* fn. 7 *supra*), NASDAQ spreads decreased dramatically and the NASDAQ trading volume increased dramatically. *See In re NASDAQ Market-Makers Antitrust Litig.*, 172 F.R.D. 119 (S.D.N.Y. 1997); *United States v. Alex. Brown & Sons Inc., et al.*, No. 96-cv-5313(RWS), *Competitive Impact Statement*, at 31 n.15 (S.D.N.Y. July 17, 1996) (available at www.Usdoj.gov/atr/cases/fo700/0739.htm).

During 1993, NASDAQ accounted for 43% of the NYSE volume. Division of Market Regulation, *Market 2000: An Examination of Current Equity Market Developments* (SEC January 1994) (available at *http://www.sec.gov/divisions/marketreg/market2000.pdf*). By March of 1996, NASDAQ share volume was 121 percent of the NYSE volume for the year, comprising 54 percent of the volume traded in all U.S. equity markets combined. *Id. Self-Regulatory Organizations; Notice of Filing of Amendment No. 2 to Proposed Rule Change by National Assoc. of Securities Dealers, Inc. Relating to the NAqcess System and Accompanying Rules of Fair Practice*, Rel. No. 34-37302, 61 F.R. 31574-01, at 31590 (SEC June 20, 1996).

Thus, when the antitrust claims alleged in *Nasdaq* terminated the prior collusion, investors greatly benefited. Further, the end to collusion was in the enlightened self-interest of Nasdaq marketmakers because fair, competitive charges meant much more investor trust, lower transaction

costs, higher trading volume and more company listings on *Nasdaq*.

In contrast, the antitrust prosecutions of the SEC-mandated, fixed stock brokerage commissions were initially and ultimately unsuccessful. *See, e.g., Kaplan v. Lehman Bros.*, 389 U.S. 954 (1967); *Gordon, supra*. However, they prompted many thinking people to question the wisdom of the SEC's oversight in permitting fixed commissions. *Compare Kaplan, supra*. Under this antitrust and public scrutiny, SEC policy changed. On May 1, 1974, fixed commissions ended, and the groundwork was laid for discount brokers and additional billions of dollars in investor savings.

B. One Reason Why Antitrust Prosecutions Have Been So Beneficial To The Securities Markets Is Explained By The Nobel Prize-Winning Economic Theory That The Regulatory Agency Is "Captured" By The Regulated

In part of the body of work for which he was awarded the Nobel Prize in 1982, Professor George Stigler stated: "A central thesis of this paper is that, as a rule, regulation is acquired by the industry and is designed and operated primarily for its benefit." George Stigler, The Citizen and the State, Essays on Regulation, p. 114 (1975); *id.* at p. 185; *see also* Jean-Marie Gagnon, *Policing the Securities Industry – Do we need a national regulator?*, Globe and Mail, January 28, 2004 ("Years ago, the late George Stigler (who won the Nobel Memorial Prize in Economic Science in 1982) suggested that regulators tend to be captured by the regulated . . . Consequently, there is a tendency, in the long run, for the regulator to become an intellectual prisoner of the regulated.").

Although some later economic studies have reduced "captured" to "disproportionately influenced"[16], the

16. *Compare*, Gary Becker, Journal of Law and Economics, Vol. 19, No. 2, Conference on the Economics of Politics and Regulation, pp. 245 – 248 (August 1976) ("The economic approach to political behavior has (Cont'd)

phenomenon described by these papers is one plausible or partial explanation of why antitrust prosecutions in the securities markets have directly (as in *Nasdaq*) or indirectly (by focusing public scrutiny to overcome "capture" as in *Kaplan v. Lehman* and *Gordon*) had such a beneficial effect on the markets and investors.

The prosecution of this case will not chill capital raising, and will likely be in the enlightened self-interest of Petitioners and the friends of the Court (actually friends of Petitioners) who fear it.

VIII. THE SEC AND THE DOJ HAVE NOT FILED A BRIEF CONCERNING CERTIORARI IN THIS COURT, DID NOT VOLUNTARILY FILE ANY BRIEFS IN THE COURTS BELOW, AND THE SECURITIES LAWS AND SEC HAVE ALWAYS TRIED TO STOP THE REPREHENSIBLE CONDUCT CHALLENGED HERE

Petitioners' last supposed ground for certiorari is a supposed conflict between the DOJ and SEC. However, the DOJ and SEC have previously cooperated together on many joint investigations of conduct that violated both the antitrust laws and the securities laws (App. 206a fn 6), and they **agree** that the reprehensible conduct here has always violated both. *See* II A and B *supra*.

Indeed, Congress and the SEC have been trying to stop tie-ins and laddering agreements for seven decades. *See* pp. 13-16 *supra*. Further, the SEC concedes that it can foresee no circumstances in which it would ever purport to permit these agreements. App. at 189a-192a. Thus, the only relatively small conflict arises from the SEC's following statement:

> Current precedent does not, however, foreclose the Commission's ability in response to future developments

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(Cont'd)

frequently been said to imply that producers rather than consumers gain from legislation, that legislation does not promote the 'general welfare' because it is 'captured' by producers. As a result of the emphasis on 'capture,' several studies have tried to determine when firms in an industry can act collectively to promote their interests.").

> to authorize conduct by underwriters that could be characterized as a tie-in or laddering." For example, **while it is difficult to envision the circumstances under which the Commission would do so**, the Commission could approve an SRO [self-regulatory organization] rule that permitted such conduct, **assuming that the statutory requirements under the Exchange Act were met,** including the requirements that the rule be designed to protect investors and the public interest, and **that it not impose any burden on competition not necessary or appropriate in** furtherance of the purposes of the act.

App. at 191a, SEC Letter, p. 3 (emphasis supplied).

The SEC's foregoing attempt to capture the maximum future authority for itself in circumstances which are "difficult to envision" (and will never occur) merely recites perfunctorily some of the definitional conditions within which the SEC can promulgate a new rule. This perfunctory recitation is meaningless, tautological, and could be equally asserted with respect to any pernicious practices. Indeed, the only authority that federal agencies (and SROs) possess to make rules, is the authority to make rules **consistent** with Congressional purpose and statute. *United States v. Larionoff*, 431 U.S. 864, 872 (1977) (regulations contrary to the manifest purposes of Congress in enacting variable re-enlistment bonus program were invalid); *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 198-199 (1976) (rejecting SEC's interpretation of statutory language in Section 10(b) as encompassing liability for negligence where words in the statute contradict such interpretation).

Here, Congressional purpose is to stop pools, laddering, and tie-ins. *See* App. at 11a-16a. Although we assert that the SEC has no power to permit the laddering and tie-in practices alleged here, it is nonetheless clear that the real conflict between DOJ and SEC is limited to speculation about unforeseen, unlikely future events that would be contrary to seventy years' experience. This is no basis for certiorari.

CONCLUSION

For the foregoing reasons and authorities, the Petition should be denied.

Respectfully submitted,

CHRISTOPHER LOVELL
Counsel of Record
GARY S. JACOBSON
RYAN E. LONG
LOVELL STEWART
& HALEBIAN LLP
500 Fifth Avenue
New York, NY 10110
(212) 608-1900

J. DOUGLAS RICHARDS
MILBERG WEISS BERSHAD
& SCHULMAN LLP
One Pennsylvania Plaza
New York, NY 10119
(212) 594-5300

RICHARD S. SCHIFFRIN
SCHIFFRIN & BARROWAY LLP
280 King of Prussia Road
Radnor, PA 19087
(610) 667-7706

HOWARD B. SIROTA
SIROTA & SIROTA LLP
110 Wall Street, 21st Floor
New York, NY 10005
(212) 425-9055

Fred Taylor Isquith
Wolf Haldenstein Adler
Freeman & Herz LLP
270 Madison Avenue
Ninth Floor
New York, NY 10016
(212) 545-4600

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In the Supreme Court of the United States

CREDIT SUISSE FIRST BOSTON LTD., ET AL.,

Petitioners,

v.

GLEN BILLING, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

REPLY TO BRIEF IN OPPOSITION FOR RESPONDENT GLEN BILLING

ROBERT B. MCCAW
LOUIS R. COHEN
ALI M. STOEPPELWERTH
FRASER L. HUNTER, JR.
NOAH A. LEVINE
WILMER CUTLER PICKERING
HALE & DORR LLP
399 Park Avenue
New York, New York 10022
(212) 230-8800
Attorneys for Petitioner
Citigroup Global Markets Inc.

STEPHEN M. SHAPIRO
Counsel of Record
KENNETH S. GELLER
TIMOTHY S. BISHOP
MAYER, BROWN, ROWE &
MAW LLP
1909 K Street, N.W.
Washington, D.C. 20006
(202) 263-3000
Attorneys for Petitioner
Merrill Lynch, Pierce,
Fenner & Smith Incorporated

Counsel for Petitioners
[Additional Counsel Listed On Signature Page]

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Thirty years ago in *Gordon* this Court ruled that activities regulated by the SEC and by self-regulatory organizations (in that case, commission rates) must be given antitrust immunity to the extent necessary to allow the securities laws to work as Congress intended. The same clash between securities regulation and antitrust has now arisen in a different area of securities activity—the structuring and negotiation of syndicated IPOs—and, as the SEC, NASD, and NYSE have made clear, the Second Circuit has forgotten the lesson this Court taught in *Gordon*, which other circuits have learned.

A syndicated IPO necessarily involves agreements among underwriting firms and discussions between underwriters and customers who may participate in the offering. The process is pervasively regulated, pursuant to statute, by the SEC and NASD. One objective of regulation is to preserve a fair field of competition, but a more fundamental goal is to promote an efficient capital-raising process that is the envy of the world. The issue in this case is whether the participants in that process must now anticipate that classes of disappointed investors will be able to ask antitrust juries for treble damages—which in this area of activity will always be massive—for actions that are subject to much more nuanced expert regulation.

Plaintiffs seek to open this new route to recovery because Congress in legislation such as the Private Securities Litigation Reform Act circumscribed the role of class actions in policing activities subject to the federal securities laws. The Second Circuit, the most important venue for this kind of case, has allowed plaintiffs to open that door, threatening every securities firm involved in a syndicated offering with massive antitrust liability. That threat, the SEC warns, will make avoiding treble damages liability under antitrust's competition-first rules the predominant consideration in the underwriting process, "overruling the Congressional regulatory regime" and discouraging conduct the SEC has concluded is beneficial to capital formation. Pet. App. 156a, 193a-197a; NASD Br. 11-13; 15 U.S.C. §§ 77b(b),

78w(a)(2). It is important to preserving American capital-raising processes and Congress's scheme for regulating them that this Court correct the Second Circuit's error.

1. Plaintiffs pretend (at 1-11, 22-23) that the Second Circuit correctly applied this Court's precedents. To be sure, the court of appeals recited that immunity is implied when there is "plain repugnancy between the antitrust and regulatory provisions," is "not favored," and is granted "to the minimum extent necessary." *Gordon*, 422 U.S. at 682-683. But its multi-factor test to determine whether repugnancy exists—which the Second Circuit applied rigidly but plaintiffs now say (at 7-8) is so "flexible" and "broad-ranging" that it provides market participants with no guidance at all—veers far from this Court's teachings. Indeed, plaintiffs *conceded* below that those factors could not be discerned from this Court's decisions. See Pet. App. 62a-63a.

Gordon refutes the Second Circuit's immunity test. Contrary to plaintiffs' argument (at 7-8), the Second Circuit's test *always* requires a showing that "Congress contemplated the *specific conflict* and intended for the antitrust laws to be repealed." Pet. App. 57a (emphasis added). *Gordon* required no such showing of express congressional intent, holding that immunity is necessary when there is a potential for conflict between the application of the antitrust laws and the regulatory regime governing the challenged activity. In *Gordon*—in which the SEC and Department of Justice took opposed positions as they have in this litigation—this Court implied immunity for fixed commission rates based on the SEC's broad statutory authority to regulate the subject, its active oversight of commission rates, and the risk of conflicting standards. The Court explained that "the sole aim of antitrust legislation is to protect competition," whereas the SEC must also consider "the economic health of the investors, the exchanges, and the securities industry." 422 U.S. at 685-689. Those factors support immunity here because the SEC and NASD extensively regulate all aspects of the IPO process, have

brought enforcement actions aimed at the alleged tie-ins and excessive commissions that plaintiffs challenge, have issued finely drawn guidance addressing what is permissible during bookbuilding, and have proposed pertinent rule changes. Pet. 6-9, 15-18. *Gordon*'s focus on whether "an antitrust suit would conflict with the operation of the regulatory scheme" cannot be reconciled with the Second Circuit's ruling. 422 U.S. at 688. As in *Gordon*, application of antitrust laws here would "render nugatory the legislative provision for regulatory agency supervision." *Id.* at 691.

As the district court found (Pet. App. 93a-120a) and the SEC confirmed (*id.* at 132a-139a), the SEC's power over the IPO process and the specific practices alleged here is at the heart of its regulatory authority. That power is at least as "pervasive" as the SEC's power over the NASD—a power also at issue in this case, see *id.* at 104a-110a, 138a-139a—which this Court held in *NASD* required implied immunity.

2. Plaintiffs try to dodge *Trinko*, but it confirms that under *Gordon* and *NASD* immunity is necessary when there is "the real possibility of [antitrust] judgments conflicting with the agency's regulatory scheme." 540 U.S. at 406. *Trinko* explains that when "a regulatory structure designed to deter and remedy anticompetitive harm" like the securities laws is in place, "the additional benefit to competition provided by antitrust enforcement" is "small." *Id.* at 412. The costs, in contrast, are substantial. Superimposing the Sherman Act on top of a "detailed regulatory scheme" "distort[s] investment" as regulated businesses seek to avoid the "[m]istaken inferences" and "false condemnations" that inevitably result from jury determinations under the antitrust laws. *Id.* at 406, 414. And it adds another wasteful "layer of interminable litigation, atop the variety of litigation routes already available to and actively pursued by" aggrieved parties. *Id.* at 414; see also *Merrill Lynch* v. *Dabit*, 126 S. Ct. 1503, 1514 (2006) ("parallel class actions" under distinct legal standards are "wasteful" and "duplicative"). The factors identified in *Trinko a fortiori*

support implied immunity here. See HERBERT HOVENKAMP, THE ANTITRUST ENTERPRISE 237 (2005) (*Trinko* explains that if "antitrust will be particularly difficult to apply and prone to error, then it would likely do more harm than good in a well-regulated regime" that takes account of competition).

3. Plaintiffs' reliance on *Otter Tail* and *Philadelphia National* Bank (at 6-7) is misplaced. Neither case involved comprehensive legislation that protects the vital federal interest in public securities markets. See *Dabit*, 126 S. Ct. at 1509. Those decisions stand for the unremarkable proposition that limited regulatory authority by itself does not require immunity where the legislative record affirmatively demonstrates that Congress intended antitrust review to continue unimpeded. *Otter Tail*, 410 U.S. at 374-375 (describing Congress's "reject[ion of] a pervasive regulatory scheme" and "policy of maintaining competition to the maximum extent possible"); *Philadelphia Nat'l Bank*, 374 U.S. at 352 (legislative history "stated that the [Bank Merger] Act would not affect in any way the applicability of the antitrust laws").

Plaintiffs get no help either from *National Gerimedical*. There this Court held only that conduct having little connection to the regulatory scheme does not qualify for immunity—while recognizing that immunity must be implied when "necessary" to the exercise of regulators' "authorized powers." 452 U.S. at 393 n.18; see *id.* at 389-393 (challenged conduct was a "spontaneous response to the finding of [a private] advisory planning body" rendered when there was "no regulation" because "the regulatory aspects of the [law] were not in place"). *Silver* rejected implied immunity because the SEC lacked jurisdiction over the challenged conduct—but recognized that if the SEC had jurisdiction "a different case" would be presented. 373 U.S. at 357-361.

That plaintiffs can identify (at 12-14 & nn.7-9) antitrust suits that proceeded against securities market participants is irrelevant. 15 U.S.C. § 77p(a) and § 78bb(a) do not explain those decisions. Opp. 25. Those provisions are not antitrust

savings clauses and did not bar immunity in *NASD* or *Gordon*. The explanation is simpler. Mere overlap is no ground for immunity (Pet. App. 192a); the potential for conflict must make the antitrust laws repugnant to the securities regulatory scheme. In *NASDAQ Market Makers* the district court did not address immunity. In *Strobl* "the absence of conflict" was guaranteed because both laws "had the same goal and considered the same factors." *Friedman*, 313 F.3d at 800. In no case plaintiffs rely on did the SEC state that application of the antitrust laws would infringe its regulatory authority.

4. Plaintiffs' denial of any circuit conflict (at 25) consists of quotations showing that courts of appeals imply immunity when there is repugnancy between antitrust and the regulatory regime. But in applying that standard other courts of appeals give decisive weight to whether the SEC "exercises extensive oversight authority" over activities "envisioned to be fully dealt with under the securities acts" and focus on interference with the regulatory scheme created by Congress. *Austin Mun.*, 757 F.2d at 695; *Schaefer*, 509 F.2d at 1300; *Thill*, 633 F.2d at 69-70; *Harding*, 527 F.2d at 1370. Such inquiries faithfully address this Court's concern with the practical consequences of infringing the SEC's authority. *NASD*, 422 U.S. at 732, 735. Had any of those courts decided this case, it would have implied immunity.

5. Plaintiffs assert (at 11-21) that there is no repugnancy between the antitrust laws and securities laws because the conduct they allege is unlawful under both. In urging that immunity is necessary, however, the SEC assumed that defendants' conduct violated the securities laws. Pet. App. 129a n.2. Courts recognize that it may be necessary to imply immunity to protect a regulatory scheme even when the conduct challenged in an antitrust suit is unlawful under that scheme. By the time *Gordon* reached this Court the SEC had outlawed the fixed commission rates plaintiffs challenged as horizontal price fixing, yet this Court implied immunity. 422 U.S. at 682. In *Trinko* this Court recognized that had it not

been for an antitrust savings clause the regulatory scheme created by the Telecommunications Act would have been a "good candidate for implication of antitrust immunity." 540 U.S. at 406. The conduct at issue was not "benign." Opp. 19. Verizon was alleged to have breached its statutory duty "to share its network with competitors." *Id.* at 401. An FCC investigation had resulted in Verizon entering into a consent decree and paying millions of dollars to the United States and competitors. *Id.* at 403-405. In *Schaefer* the court implied immunity from a claim that broker-dealers conspired to inflate the price of a stock. Though that scheme was unlawful under the Exchange Act and resulted in criminal convictions for conspirators, the court held the conduct immune because the "sort of manipulation scheme underlying" plaintiffs' antitrust claim "was envisioned to be fully dealt with under the securities acts." 509 F.2d at 1290-1291, 1299-1300.

6. Claiming (at 28-29) that "only relatively small conflict arises" from the possibility that in the future the SEC could permit tie-ins that are now unlawful, plaintiffs ignore the fact that *whether* particular conduct during an IPO is lawful or unlawful depends on nuanced distinctions drawn under securities law standards. Antitrust juries applying competition-first principles will not replicate securities regulators' expert judgments, creating conflict that makes implied immunity necessary here. Pet. App. 156a, 196a; NASD Br. 12-13; see *Brown* v. *Pro Football*, 518 U.S. at 242 (superimposing antitrust brings "instability and uncertainty" to the federal regulatory process, substituting "a web of detailed rules spun by many different nonexpert antitrust judges and juries" for the consistent rules, enforced by an "expert administrative body," envisaged by Congress).

The SEC has drawn fine lines that permit conversations between an underwriter and a potential IPO purchaser about the investor's aftermarket interest in the stock at various prices and intention to build a long-term position rather than "flip" the stock. Pet. App. 224a, 228a. Allowing lay antitrust

juries awarding treble damages to determine whether such conversations qualify as permissible bookbuilding inquiries or are instead illicit tie-in agreements will chill underwriters from making inquiries that the SEC recognizes are "essential" to the success of an IPO. *Id.* at 223a. The SEC has explained that its determination that such inquiries benefit the capital markets would be "supplanted" and its "ability to interpret, apply, and revise the governing law" based on "complex considerations of fact, law and policy" would be displaced by the need for underwriters to steer well clear of potential antitrust liability. *Id.* at 156a, 194a-196a; see NASD Br. 1, 8; Frank H. Easterbrook, *Ignorance and Antitrust*, in ANTITRUST, INNOVATION, AND COMPETITIVENESS 119, 127, 129-131 (Thomas Jorde & David Teece eds., 1992) (case-by-case jury inquiry, "certain to produce errors," forces firms to avoid "beneficial practices that create risks of condemnation" and carries "great potential to injure the economy by misunderstanding and condemning complex practices").

Whether a commission payment is lawful or unlawful under the securities laws is also a complex question. The difficulty of that inquiry and the need for securities expertise is illustrated by *Invemed Associates*. An NASD panel there determined, in a 94-page opinion following a 17-day evidentiary hearing, that higher-than-normal commissions on 700 transactions paid by customers seeking IPO allocations did not violate NASD rules. Observing that underwriters may properly give preference to good customers when allocating IPO shares, and that customers may lawfully seek "good customer" status by increasing order flow and commission payments, the panel engaged in a detailed factual inquiry into particular customer relationships and payments to determine whether that line had been crossed. There is no reason to expect that a lay antitrust jury faced with the same facts would reach the same result as NASD's expert panel. Market participants would accordingly have to curtail bookbuilding activities. The potential for such conflicting judgments about

the legality of conduct demands implied immunity. *Gordon*, 422 U.S. at 685-691.

The tie-in conduct plaintiffs allege is closely regulated by the SEC and NASD under a scheme that would be disrupted by these suits. But contrary to plaintiffs' protestation, this case is not just about tie-ins. The district court held that plaintiffs' conspiracy allegations—which lie at the core of their claims—mount "a theater-wide attack on the syndicate system." Pet. App. 86a; see Compl. ¶¶ 37-39, 45-47, 49, 54, 56. The SEC predicts that harm "will be done to the securities regulatory system" if antitrust claims may proceed based on allegations that underwriters engaged in such "permissible, regulated" joint conduct, "combined with conclusory assertions that during the course of these activities, defendants conspired to violate the law." Pet. App. 155a.

7. Plaintiffs (at 27-28) say the SEC's and NASD's judgments that immunity is necessary here evidence "capture" by the securities industry—even though the SEC and NASD pursued aggressive enforcement actions against some of the defendants. This Court recognizes "the expertise of the SEC" and "the confidence the Congress has placed in the agency," and the NASD operates under "stringent" SEC oversight. *Gordon*, 422 U.S. at 689-690; NASD Br. 1. Courts have implied immunity in every other case in which the SEC argued it was necessary, which plaintiffs concede is a fraction of the suits in which antitrust allegations overlap securities laws. The SEC's and SROs' advantages in determining whether conduct during an IPO is harmful or beneficial—long experience, sophisticated understanding of the markets, broad investigative powers, responsiveness to changing circumstances, and consistent decision-making—would be lost if underwriters instead must "reac[t] to what they see as the likely outcome of [antitrust] proceedings." *Town of Concord* v. *Boston Edison*, 915 F.2d 17, 22 (1st Cir. 1990) (Breyer, C.J.).

8. Beyond hyperbolic accusations and bromides about the importance of fostering private antitrust litigation, plaintiffs

offer no reason why implied immunity doctrine should be twisted to allow duplicative actions that seek treble damages for conduct that is the subject of hundreds of suits brought by many of these same counsel under the securities laws. *IPO*, 241 F. Supp. 2d 281. Opening the courthouse doors to securities litigation dressed up in antitrust clothing frustrates Congress's intentions. Congress gave authority to regulate securities markets to the SEC and SROs, yet the ruling below shifts ultimate authority to antitrust courts and juries. Congress mandated that competition be one consideration in securities regulation, along with "efficiency," and "capital formation," yet the ruling below subjects market participants to antitrust laws the "sole aim" of which "is to protect competition." *Gordon*, 422 U.S. at 689. The Second Circuit's endorsement of using the antitrust laws to challenge conduct at the core of SEC and NASD authority also completely bypasses Congress's securities class action reforms.

Congress enacted the PSLRA to end "abuses of the class-action vehicle" that forced "extortionate settlements." *Dabit*, 126 S. Ct. at 1510-1511. "Rather than face the obstacles" created by the PSLRA, plaintiffs filed state-law class actions in state court "to avoid the federal forum." *Id.* at 1511. Congress enacted the Securities Litigation Uniform Standards Act ("SLUSA") to close that loophole, and this Court rejected "a narrow reading" of SLUSA that "would undercut the effectiveness of the 1995 Reform Act." *Id.* at 1513. Plaintiffs now attempt another end-run by pleading securities claims as antitrust claims. Antitrust suits are subject to none of the PSLRA's procedural and discovery limitations. Pet. 29. Under the Second Circuit's narrow view of implied immunity, Congress's system for resolving private securities law suits is replaced with the "expense and delay inherent in antitrust litigation," producing "groundless claim[s]" with *in terrorem* settlement values augmented by a threat of treble damages inconsistent with the securities laws' prohibition on punitive awards. *Turner Broad.* v. *FCC*, 520 U.S. 180, 222 (1997); *Dura Pharms.* v. *Broudo*, 544 U.S. 336, 347 (2005).

9. Plaintiffs' procedural objections are meritless. This Court often reviews interlocutory antitrust decisions. *E.g.*, *F. Hoffmann-La Roche* v. *Empagran*, 542 U.S. 155 (2004); *Trinko*; *NYNEX* v. *Discon*, 525 U.S. 128 (1998); *Hartford Fire Ins.* v. *California*, 509 U.S. 764 (1993); *Summit Health* v. *Pinhas*, 500 U.S. 322 (1991). It did so in *NYNEX*, *Hartford Fire*, and *Summit Health* in the absence of any dissent or en banc review below. It reviewed reversals of dismissals in *NYNEX* and *Trinko* where defendant presented, but the lower courts did not address, alternative grounds for dismissal. *Trinko*, 123 F. Supp. 2d 738, 745 (S.D.N.Y. 2000); *NYNEX*, 1992 U.S. Dist. LEXIS 22722, at *17 n.4 (W.D.N.Y. 1992). This case is ripe for review. The clashing positions of the SEC and the DOJ are fully developed. The conflicts between the Second Circuit's ruling and decisions of this Court and other circuits are manifest. The importance of the case is documented by the SEC, NASD, NYSE and SIA. The purpose of implied immunity would be lost if review were delayed. See *Mitchell v. Forsyth*, 472 U.S. 511, 526-27 (1985).

10. Further percolation of the issue is unlikely. Given the Sherman Act's liberal venue provisions and centralization of the securities industry and securities lawsuits in New York, plaintiffs will file securities-related antitrust claims in the Second Circuit—a result already underway. *E.g.*, *Electronic Trading* v. *Banc of America Sec.*, 06 CV 2859 (S.D.N.Y., complaint filed Apr. 12, 2006) (charging antitrust conspiracy by broker-dealers related to commissions on short sale transactions regulated by the SEC). District courts bound by the Second Circuit's ruling will reject immunity defenses in unappealable orders denying motions to dismiss. A defendant hoping to obtain this Court's review would have to undertake the risk of a trial and treble damages award. SIA Br. 19-20. For practical purposes, this is the only opportunity this Court will have to address the question presented.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted.

ROBERT B. MCCAW
LOUIS R. COHEN
ALI M. STOEPPELWERTH
FRASER L. HUNTER, JR.
NOAH A. LEVINE
WILMER CUTLER PICKERING
HALE & DORR LLP
399 Park Avenue
New York, New York 10022
(212) 230-8800
Attorneys for Petitioner Citigroup Global Markets Inc.

STEPHEN M. SHAPIRO
Counsel of Record
KENNETH S. GELLER
TIMOTHY S. BISHOP
MAYER, BROWN, ROWE & MAW LLP
1909 K Street, N.W.
Washington, D.C. 20006
(202) 263-3000
Attorneys for Petitioner Merrill Lynch, Pierce, Fenner & Smith Incorporated

ANDREW J. FRACKMAN
RICHARD G. PARKER
BRENDAN DOWD
O'MELVENY & MYERS LLP
Seven Times Square
New York, New York 10036
(212) 326-2000
Attorneys for Petitioner Robertson Stephens, Inc.

ANDREW B. CLUBOK
RICHARD A. CORDRAY
BRANT W. BISHOP
KIRKLAND & ELLIS LLP
655 15th Street, N.W.
Washington, D.C. 20005
(202) 879-5000
Attorneys for Petitioner Morgan Stanley & Co. Inc.

A. ROBERT PIETRZAK
JOEL M. MITNICK
SIDLEY AUSTIN LLP
787 Seventh Avenue
New York, New York 10019
(212) 839-5300
Attorneys for Petitioner Deutsche Bank Securities Inc.

SHEPARD GOLDFEIN
JAMES A. KEYTE
SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP
Four Times Square
New York, New York 10036
(212) 735-3000
Attorneys for Petitioner Janus Capital Management LLC

RICHARD A. CIRILLO
KAREN R. KOWALSKI
KING & SPALDING LLP
1185 Avenue of the Americas
New York, New York 10036
(212) 556-2100
Attorneys for Petitioner Credit Suisse First Boston LLC

MOSES SILVERMAN
PHILIP G. BARBER
PAUL, WEISS, RIFKIND, WHARTON & GARRISON LLP
1285 Avenue of the Americas
New York, New York 10019
(212) 373-3000
Attorneys for Petitioner Lehman Brothers Inc.

JON R. ROELLKE
JEFFREY H. DRICHTA
CLIFFORD CHANCE US LLP
2001 K Street, N.W.
Washington, D.C. 20006-1001
(202) 912-5000
Attorneys for Petitioner Merrill Lynch, Pierce, Fenner & Smith Incorporated

PAUL GONSON
GLENN R. REICHARDT
KIRKPATRICK & LOCKHART NICHOLSON GRAHAM LLP
1601 K Street, N.W.
Washington, D.C. 20006
(202) 778-9000
Attorneys for Petitioner Merrill Lynch, Pierce, Fenner & Smith Incorporated

GANDOLFO V. DIBLASI
PENNY SHANE
DAVID M.J. REIN
RICHARD J.L. LOMUSCIO
SULLIVAN & CROMWELL LLP
125 Broad Street
New York, New York 10004
(212) 558-4000
Attorneys for Petitioners The Goldman Sachs Group, Inc. and Goldman, Sachs & Co.

RANDY M. MASTRO
JOHN A. HERFORT
RICHARD FALEK
GIBSON, DUNN & CRUTCHER LLP
200 Park Avenue
New York, New York 10166
(212) 351-4000
Attorneys for Petitioner Bear, Stearns & Co., Inc.

STEVEN WOLOWITZ
MATTHEW INGBER
MAYER, BROWN, ROWE & MAW LLP
1675 Broadway
New York, New York 10019
(212) 506-2500
Attorneys for Petitioner Comerica, Inc.

GERALD J. FIELDS
KEVIN C. LOGUE
PAUL HASTINGS JANOFSKY
& WALKER LLP
75 East 55th Street
New York, New York 10022
(212) 318-6000
Attorneys for Petitioners Van Wagoner Capital Management, Inc. and Van Wagoner Funds, Inc.

JOHN D. DONOVAN, JR.
ROBERT G. JONES
ROPES & GRAY LLP
One International Place
Boston, Massachusetts 02110
(617) 951-7000
Attorneys for Petitioners Fidelity Distributors Corp., Fidelity Brokerage Services LLC, and Fidelity Investments Institutional Services Co., Inc.

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IN THE

Supreme Court of the United States

CREDIT SUISSE FIRST BOSTON LTD., ET AL.,

Petitioners,

v.

GLEN BILLING, ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF AND BRIEF OF THE NATIONAL ASSOCIATION OF SECURITIES DEALERS, INC., AS *AMICUS CURIAE* SUPPORTING PETITIONERS

THEODORE B. OLSON
Counsel of Record
F. JOSEPH WARIN
DOUGLAS R. COX
AMIR C. TAYRANI
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500

Counsel for Amicus Curiae

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MOTION OF THE NATIONAL ASSOCIATION OF SECURITIES DEALERS, INC., FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF

Pursuant to this Court's Rule 37.2(b), the National Association of Securities Dealers, Inc., respectfully moves for leave to file the attached *amicus curiae* brief supporting petitioners. A letter signed by petitioners' counsel consenting to the filing of this brief has been lodged with the Court. Counsel for respondents has withheld consent to the filing of this brief.

The question presented in this case is whether a cause of action is available under the federal antitrust laws to challenge alleged collusive conduct and market manipulation in initial public offerings by underwriters and institutional investors. The National Association of Securities Dealers, Inc. ("NASD"), has a substantial interest in the resolution of this question because, pursuant to federal law, the NASD has

regulatory responsibilities that fall within the subject matter of this antitrust suit. The availability of an antitrust cause of action based on alleged collusion and market manipulation by broker-dealers would disrupt the NASD's carefully calibrated regulatory regime.

The NASD is a private Delaware corporation, functioning as a self-regulatory organization ("SRO") and registered with the Securities and Exchange Commission ("SEC") as a national securities association. 15 U.S.C. § 78o-3. The NASD and other SROs exercise regulatory authority over the securities industry, subject to the stringent oversight of the SEC. For more than half a century, the NASD has been the primary regulatory body for the broker-dealer industry, and it closely regulates the market activities of the underwriters and institutional investors named as defendants in this antitrust suit. Significantly, the NASD has initiated disciplinary proceedings in response to the incidents of alleged price manipulation challenged in this case, including against several of the petitioners.

The NASD's regulatory responsibilities provide it with a unique perspective into the issues raised by this case and a profound awareness of the far-reaching consequences that would result from superimposing the antitrust laws on the securities regulatory framework. The Second Circuit's holding that investors may bring antitrust suits challenging alleged collusion and market manipulation by broker-dealers will create conflicting systems of securities regulation and significantly disrupt the uniform national securities market that Congress intended to establish. The pervasive litigation and crippling regulatory confusion that will inevitably result from the Second Circuit's decision will impede the NASD's efforts to regulate the broker-dealer industry in a manner that promotes market stability and capital formation.

For the foregoing reasons, the NASD respectfully requests that this Court grant its motion for leave to file the attached *amicus curiae* brief.

Respectfully submitted.

THEODORE B. OLSON
Counsel of Record
F. JOSEPH WARIN
DOUGLAS R. COX
AMIR C. TAYRANI
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500

Counsel for Amicus Curiae

April 12, 2006

QUESTION PRESENTED

Whether a cause of action is available under the federal antitrust laws, based upon alleged collusive conduct and market manipulation by underwriters and institutional investors, where Congress has directed that the challenged conduct be subject to comprehensive regulation by the Securities and Exchange Commission and the National Association of Securities Dealers.

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BRIEF OF THE NATIONAL ASSOCIATION OF SECURITIES DEALERS, INC., AS *AMICUS CURIAE* SUPPORTING PETITIONERS

INTEREST OF *AMICUS CURIAE*[1]

The question presented in this case is whether a cause of action is available under the federal antitrust laws to challenge alleged collusive conduct and market manipulation in initial public offerings by underwriters and institutional investors. The National Association of Securities Dealers, Inc. ("NASD"), has a substantial interest in the resolution of this question because the NASD has regulatory responsibilities that fall within the subject matter of this suit. The availability of an antitrust suit based on alleged collusion and market manipulation by broker-dealers would disrupt the NASD's carefully calibrated regulatory regime—a regime that provides ample guidance for participants in the initial public offering ("IPO") marketplace, and ample authority to punish the misconduct of market participants.

The NASD is a private Delaware corporation, functioning as a self-regulatory organization ("SRO") and registered with the Securities and Exchange Commission ("SEC") as a national securities association pursuant to the 1938 Maloney Act Amendments to the Securities Exchange Act of 1934. 15 U.S.C. § 78o-3 *et seq.* The NASD and other SROs exercise regulatory authority over the securities industry, subject to the stringent oversight of the SEC, which must approve nearly all SRO rules. For more than half a century, the

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[1] Pursuant to this Court's Rule 37.6, *amicus* states that counsel for co-petitioner Bear, Stearns & Co., Inc., is also counsel for *amicus* in this matter, and that no person or entity other than *amicus*, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

NASD has been the primary regulatory body for the broker-dealer industry, and it closely regulates the market activities of the underwriters and institutional investors named as defendants in this antitrust suit. Securities Exchange Act Release No. 2211, 5 S.E.C. 627 (Aug. 7, 1939). Significantly, the SEC and NASD are statutorily required to take competitive considerations into account—the goal of the antitrust laws—when discharging their regulatory mandates. *Id.* § 77b(b); *id.* § 78o-3(b)(9). Both the SEC and NASD have initiated disciplinary proceedings—including against several of the petitioners—in response to the incidents of alleged price manipulation challenged in this case.

The NASD's regulatory responsibilities provide it with a unique perspective into the issues raised by this case and a profound awareness of the far-reaching consequences that would result from superimposing the antitrust laws on the securities regulatory framework. The NASD fully agrees with the arguments in favor of immunity that the SEC, as *amicus curiae*, raised before the lower courts, and urges this Court to grant the petition for certiorari. The Second Circuit's holding that investors may bring antitrust suits challenging alleged collusion and market manipulation by broker-dealers will create conflicting systems of securities regulation and significantly disrupt the uniform national securities market that Congress intended to establish. The pervasive litigation and crippling regulatory confusion that will inevitably result from the Second Circuit's decision will impede the SEC's and NASD's efforts to regulate the broker-dealer industry in a manner that promotes market stability and capital formation, and will affect the investments of millions of Americans.

STATEMENT

Investors who have suffered losses due to improper collusion and market manipulation by broker-dealers have several remedies at their disposal, including filing a securities

fraud claim or initiating a complaint with the NASD. An antitrust claim, however, is not among the available remedies.

When Congress enacted the securities laws, it impliedly repealed the antitrust laws as to market activities subject to SEC and SRO regulation and thereby immunized these activities from antitrust liability. Indeed, repeal of the antitrust laws "*must* be implied in order to permit the Exchange Act"—as well as the national securities market and cooperative system of SEC and SRO regulation established thereunder—"to function *as envisioned by Congress*." *Gordon v. N.Y. Stock Exch., Inc.*, 422 U.S. 659, 688 (1975) (emphases added); *see also, e.g.*, 15 U.S.C. § 78b (the securities laws are intended "to remove impediments to and perfect the mechanisms of a national market system for securities").

The Second Circuit's contrary conclusion conflicts with this Court's precedent and with the decisions of other circuits applying the antitrust immunity doctrine. This Court should grant certiorari to resolve these conflicts and to ensure that the reticulated securities regulatory regime established by Congress is not undermined by antitrust claims that impose inconsistent obligations on market participants and that are decided by juries lacking the SEC's specialized knowledge of the securities markets.

1. The allegations in this case concern the IPO activities of underwriting firms and institutional investors that are subject to pervasive regulation by the SEC and NASD. Pet. App. 127a (SEC *amicus* brief). Underwriters play an integral role in the IPO process. In a "firm commitment" underwriting, they purchase securities from an issuing corporation at a predetermined price and then resell the securities to institutional investors and members of the public at a higher price. Pet. App. 4a. To mitigate the risk inherent in the IPO process, underwriters form "syndicates" with other firms, which jointly underwrite a security. Pet. App. 5a. The NASD regulates syndicate operations. *See, e.g.*, NASD Rule 2710:

Corporate Financing Rule—Underwriting Terms and Arrangements.

An underwriter has a strong stake in the success of the securities that it markets because, among other things, price increases that occur in the aftermarket—the period after an IPO is first distributed—augment the benefit to its customers and the likelihood that the firm will be hired to underwrite future IPOs. Pet. App. 8a. The NASD has issued rules that establish the boundary between lawful activities designed to maintain a security's price and improper efforts to manipulate price through collusion with other broker-dealers. *See, e.g.*, NASD Rule 2790: Restrictions on the Purchase and Sale of Initial Equity Offerings; NASD Manual, IM-2110-5: Anti-Intimidation/Coordination ("It is conduct inconsistent with just and equitable practices of trade" for an underwriter "to coordinate [its] price . . . with any other [NASD] member," except "to the extent permitted by the federal securities laws"). The SEC has also promulgated extensive regulations—most notably, Regulation M—that draw a precise line between permissible and impermissible efforts to maintain a security's price. *See, e.g.*, 17 C.F.R. § 242.104(b) (prohibiting price stabilization practices, "except for the purpose of preventing or retarding a decline in the market price of a security").

2. Notwithstanding the availability of securities law remedies, respondents elected to challenge the validity of the syndicate system and several incidents of alleged market manipulation by filing an antitrust suit in the United States District Court for the Southern District of New York against a number of major underwriters and institutional investors. Pet. App. 72a. One group of respondents filed suit under section 1 of the Sherman Act, 15 U.S.C. § 1, while another group initiated a class action alleging violations of section 2(c) of the Robinson-Patman Act. *Id.* § 13(c). Both sets of claims challenged the validity of syndicate arrangements used to market IPOs and alleged that underwriting firms and

institutional investors had conspired to inflate the aftermarket price of a number of technology securities that went public in the late 1990s. Pet. App. 17a-20a.

Respondents' suit was only one of several judicial and regulatory responses to alleged misconduct in the marketing of technology IPOs. Another group of investors filed a securities fraud class action against many of the same defendants, alleging much of the same wrongdoing. *See In re Initial Pub. Offering Sec. Litig.*, 241 F. Supp. 2d 281 (S.D.N.Y. 2003). And the SEC and NASD commenced investigations into the alleged incidents of market manipulation and initiated enforcement proceedings against several broker-dealers. Pet. App. 137a.

In this case, the SEC submitted an *amicus* brief urging the district court to dismiss respondents' claims. Pet. App. 124a. The SEC argued that the antitrust laws had been impliedly repealed in this area because the securities transactions at issue were subject to comprehensive SEC and NASD oversight and that respondents' "attempts to remedy th[eir] claims through the antitrust laws threaten to disrupt the Commission's regulatory regime." Pet. App. 128a.

The district court dismissed the case in its entirety. Pet. App. 121a. Relying upon this Court's decisions in *Gordon v. New York Stock Exchange, Inc.*, 422 U.S. 659, and *United States v. NASD*, 422 U.S. 694 (1974), the court concluded that respondents' allegations did not state a valid antitrust claim because—at least as to the market activities challenged in this suit—the antitrust laws have been impliedly repealed by the federal securities laws. Pet. App. 73a. The court determined that much of the wrongdoing alleged by respondents—such as the underwriters' use of the syndicate system to market IPOs—was expressly *authorized* by the securities laws and that the availability of an antitrust claim challenging such coordination among underwriters would bring the two statutory regimes into direct conflict. Pet. App. 87a. The

court further held that, to the extent respondents alleged price manipulation that was prohibited by the securities laws and regulations, it was the responsibility of the SEC and NASD to enforce these proscriptions and that supplemental enforcement by antitrust plaintiffs would only disrupt these enforcement efforts. Pet. App. 94a. The court concluded that, because "the SEC, both directly and through its pervasive oversight of the NASD and other SROs, either expressly permits the conduct alleged . . . or has the power to regulate the conduct," a "failure to find implied immunity would conflict with [the] overall regulatory scheme." Pet. App. 119a. In the absence of immunity, the court explained, petitioners would be forced "to navigate the Scylla of securities regulation and the Charybdis of antitrust law." Pet. App. 73a.

3. The Second Circuit reversed. Based upon its interpretation of *Gordon* and *NASD*, the court devised a fact-intensive four-pronged test for determining whether the antitrust laws have been impliedly repealed. Pet. App. 57a. The Second Circuit's novel framework—which it had not applied in earlier antitrust immunity cases (*see, e.g.*, *In re Stock Exchs. Options Trading Antitrust Litig.*, 317 F.3d 147 (2d Cir. 2003))—considers the securities laws' legislative history, whether the antitrust and securities laws could impose conflicting mandates on regulated persons, whether application of the antitrust laws would nullify a provision of the securities laws, and the frequency with which the SEC and NASD regulate the anticompetitive conduct. Pet. App. 57a.

The Second Circuit concluded that Congress had not intended an implied repeal of the antitrust laws in this factual setting because the securities laws' legislative history yielded no explicit evidence of Congress's intention to do so. Pet. App. 64a. The Second Circuit also emphasized that respondents had failed to identify a provision of the securities laws that would be nullified by the availability of antitrust relief and that the SEC had not explicitly authorized the anticompetitive agreements alleged by respondents. Pet. App. 65a-

66a. Refusing to credit the arguments raised by the SEC as *amicus curiae*, the court dismissed as irrelevant the pervasive securities regulatory regime with which underwriters and institutional investors must comply. Although the Second Circuit conceded that "their conduct may be subject to regulation and control by the SEC in great detail," it did not accord that factor any weight in its analysis because petitioners had not received explicit authorization to engage in the market manipulation of which they are accused. Pet. App. 69a.

SUMMARY OF ARGUMENT

The NASD possesses a unique regulatory vantage point, informed by extensive institutional knowledge about the complex workings of the securities markets. From the NASD's regulatory perspective, there is an urgent need for this Court to grant certiorari because the Second Circuit's decision severely undermines the stability of the capital markets and infuses uncertainty into the uniform, nationwide regulatory system established by the federal securities laws. Indeed, the resolution of the exceptionally important question presented will have profound implications for investors, the securities industry, and the overall strength of the U.S. economy.

The SEC's *amicus* submissions to the lower courts amply demonstrate that the Second Circuit's decision allowing respondents' antitrust suit to proceed is fundamentally inconsistent with the regulatory regime that Congress established when enacting the securities laws. Congress intended for the regulation of the national securities market to rest with an expert agency, the SEC, and with the SROs that operate under its auspices. Pursuant to this regulatory authority, the SEC and SROs have promulgated a comprehensive and carefully reticulated securities regulatory regime that—unlike the antitrust laws—promotes both competition *and* other interests, including market stability and capital formation. The availability of an antitrust cause of action to challenge collu-

sion and alleged price manipulation by broker-dealers subjects the regulated community to conflicting standards of conduct and vests antitrust juries with significant authority over the operations of the securities markets. It was precisely to avoid such regulatory uncertainty and inexpert decision-making that Congress impliedly repealed the antitrust laws in this area when enacting the Exchange Act and Securities Act.

Certiorari is also warranted because the Second Circuit's decision is flatly inconsistent with this Court's antitrust immunity jurisprudence. In *Gordon v. New York Stock Exchange, Inc.*, 422 U.S. 659 (1975), and *United States v. NASD, Inc.*, 422 U.S. 694 (1975), this Court established that the antitrust laws are impliedly repealed wherever there is a potential conflict between the securities and antitrust laws, or a pervasive regulatory scheme in place. Such a potential conflict exists here because the SEC possesses the unexercised regulatory authority to authorize the market manipulation alleged by respondents. Moreover, the market activities of all broker-dealers—including syndicate relationships between underwriters and price-maintenance activities—are pervasively regulated by both the SEC and NASD. The Second Circuit disregarded this precedent when it reversed the dismissal of respondents' antitrust claims. In so doing, it created an intractable conflict with this Court's holdings and with decisions from the Fifth and Seventh Circuits that faithfully applied the implied immunity standards set forth in *Gordon* and *NASD*.

The petition for a writ of certiorari should be granted.

ARGUMENT

I. THE DECISION BELOW WILL UNDERMINE THE COMPREHENSIVE SECURITIES REGULATORY REGIME.

The NASD stands on the frontline of securities regulation. As an SRO, the NASD monitors its members' compli-

ance with the securities laws and with its own rules. The NASD has responsibility for regulating its members' participation in the IPO process and disciplining members who engage in prohibited collusion and market manipulation. The NASD's regulation of broker-dealers requires it to enforce nuanced distinctions between broker-dealers' permissible joint activities and improper collusive arrangements, and between lawful efforts to stabilize a security's price and impermissible instances of price manipulation. The SEC, in turn, closely oversees the NASD's regulatory activities and promulgates regulations applicable to all market participants in order to promote "creation of a national securities market." National Securities Markets Improvement Act of 1996, Pub. L. No. 104-290, § 102, 110 Stat. 3416, 3418; *see also* 15 U.S.C. § 78o-3(b)(6) (an organization may not be registered as a national securities association unless its rules promote a "national market system"). The Second Circuit's decision profoundly disrupts this comprehensive national regulatory scheme.

1. The NASD and SEC are statutorily required to take competitive considerations into account during their regulatory decision-making. Indeed, it is a prerequisite to the NASD maintaining registration as a national securities association that the SEC find that its rules "do not impose any burden on competition not necessary or appropriate." 15 U.S.C. § 78o-3(b)(9); *see also, e.g.*, *id.* § 77b(b) ("Whenever . . . the Commission is . . . required to consider or determine whether an action is necessary or appropriate in the public interest, the Commission shall also consider, in addition to the protection of investors, whether the action will promote efficiency, competition, and capital formation."). But because the SEC and NASD are also required to *balance* competitive interests against *other* considerations, such as ensuring the stability of the securities markets and promoting capital formation, the antitrust laws' overriding concern with promoting competition cannot be reconciled with the objec-

tives of the securities regulatory regime. *Id.*; *id.* § 78c(f). This Court itself has recognized that, because safeguarding competition is not the only concern of the SEC, inconsistent standards of conduct "are likely to result [from application of the antitrust laws to securities transactions] because the sole aim of antitrust legislation is to protect competition, whereas the SEC must consider, in addition, the economic health of the investors, the exchanges, and the securities industry." *Gordon*, 422 U.S. at 689.

2. The SEC and NASD pervasively regulate the syndicate arrangements and price manipulation that are the subject of respondents' antitrust claims to ensure that these activities are consistent with competition, market stability, and capital formation.

Although coordination among underwriting syndicates is generally a permissible means of effecting an IPO distribution, *see* Securities Exchange Act Release No. 17,371, 45 Fed. Reg. 83,707 (Dec. 19, 1980), the NASD has promulgated extensive rules concerning syndicates' operations. *See* Pet. App. 136a (SEC *amicus* brief) ("The NASD comprehensively regulates syndicate practices pursuant to rules that are formally reviewed and approved by the Commission."). The rules govern the terms of syndicate agreements and underwriter compensation. *See, e.g.*, NASD Rule 2710: Corporate Financing Rule—Underwriting Terms and Arrangements (requiring underwriting compensation to be fair and reasonable); NASD Rule 2770: Disclosure of Price in Selling Agreements (requiring the disclosure of the public selling price in syndicate agreements); NASD Rule 4624: Penalty Bids and Syndicate Covering Transactions (requiring written notice of syndicate covering transactions). The SEC has explicitly approved each of these NASD rules. 15 U.S.C. § 78s(b).

The SEC has also promulgated regulations distinguishing acceptable and unacceptable means of maintaining a se-

curity's price. Although the securities regulatory system generally looks with disfavor on price manipulation, 15 U.S.C. § 78i(a), the SEC has not instituted a blanket prohibition on all such activities. *See* Pet. App. 9a ("the securities regime tolerates a little price manipulation in order to further other goals") (internal quotation marks omitted). The SEC has instead designated certain narrowly defined circumstances where price-maintenance efforts are acceptable. *Compare* 17 C.F.R. § 242.101(a) (prohibiting a participant in a securities distribution from bidding on or purchasing a security during the initial offering period), *with id.* § 240.101(b) (exempting ten categories of transactions from the prohibition, including de minimis transactions). Indeed, the SEC possesses broad authority to exempt classes of securities and regulated persons from *any* of the securities laws and regulations. 15 U.S.C. § 78mm.

3. The Second Circuit's decision has greatly unsettled this regulatory regime. The availability of antitrust claims based upon securities transactions will unnecessarily burden market participants by requiring them to comply with a second set of partially overlapping and potentially conflicting legal requirements and by fostering complex, time-consuming, and resource-intensive litigation. *See Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 414 (2004) ("Judicial oversight under the Sherman Act would seem destined to distort investment and lead to a new layer of interminable litigation, atop the variety of litigation routes already available . . . ."). Antitrust suits will significantly impede the capital formation process by imposing liability for instances of conduct that may arguably be anticompetitive but that the SEC has found to be beneficial to the capital markets. Indeed, the risk of antitrust liability will itself deter such lawful and productive conduct.

In lieu of the undifferentiated treatment that anticompetitive behavior receives from the antitrust laws, the securities expertise of the SEC and NASD is needed to determine

whether the conduct of which petitioners stand accused is truly detrimental to the capital markets. Courts and juries applying the antitrust laws lack the specialized knowledge of the securities markets necessary to evaluate the propriety and lawfulness of such conduct. *See NASD*, 422 U.S. at 734 (antitrust immunity is necessary to prevent the "disruption of conflicting judgments that might be voiced by courts exercising jurisdiction under the antitrust laws").

The SEC and NASD have brought their regulatory expertise to bear in response to the allegations of price manipulation that are the subject of this suit. Indeed, the SEC and NASD initiated disciplinary proceedings against several petitioners for the very conduct at issue in this case. *See, e.g.*, *SEC v. Robertson Stephens, Inc.*, No. 03-00027 (D.D.C. Jan. 10, 2003) (consent judgment against Robertson Stephens, Inc., based upon allegation that it entered into anticompetitive arrangements with technology IPO customers); *SEC v. Credit Suisse First Boston Corp.*, No. 02-00090, 2002 WL 479836 (D.D.C. Jan. 29, 2002) (consent decree enjoining Credit Suisse from engaging in improper IPO-related conduct); Pet. App. 137a (SEC *amicus* brief) (detailing the NASD's enforcement efforts). The NASD also is considering several rules amendments to address incidents of price manipulation, *see, e.g.*, NASD Proposed Rule 2712: IPO Allocations and Distributions (SR-NASD-2003-140), and has promulgated NASD Rule 2790: Restrictions on the Purchase and Sale of Initial Equity Offerings, which sets forth a series of restrictions on the terms of IPO offerings.

In light of the SEC's and NASD's comprehensive regulation of the conduct alleged in respondents' complaint, there is no place for a supplemental antitrust enforcement role. Investors who allege that they have been injured by price manipulation may file a complaint with the NASD or initiate a federal securities fraud claim (as another group of plaintiffs did concerning the very conduct at issue here (Pet. App. 2a)). Allowing investors to pursue an antitrust claim against un-

derwriters and investment companies will needlessly—and dangerously—unsettle the existing, highly detailed regulatory framework. *See Town of Concord v. Boston Edison Co.*, 915 F.2d 17, 22 (1st Cir. 1990) ("where regulatory and antitrust regimes coexist, antitrust analysis must sensitively recognize and reflect the distinctive economic and legal setting of the regulated industry to which it applies") (Breyer, C.J.) (internal quotation marks and citations omitted).

The future efficacy of securities regulation—and, by extension, the future stability of the uniform, national securities market established by Congress—is squarely implicated by this case. Certiorari is warranted to ensure that the expert judgments of the SEC and NASD are not displaced by antitrust plaintiffs and the juries deciding their claims.

II. THE DECISION BELOW CONFLICTS WITH THIS COURT'S ANTITRUST IMMUNITY JURISPRUDENCE.

The Second Circuit devised a novel, four-factor inquiry for determining whether Congress intended the implied repeal of the antitrust laws when enacting the Exchange Act and the Securities Act. In so doing, it misapplied this Court's principal antitrust immunity decisions, *Gordon* and *NASD*, and improperly discounted the disruptive impact that an antitrust suit would have on the existing securities regulatory structure.

1. In *Gordon*, this Court held that the New York Stock Exchange ("NYSE") possessed implied antitrust immunity from a Sherman Act suit challenging its fixed-rate commission structure. 422 U.S. at 691. The Court's analysis emphasized that the SEC exercised regulatory authority over the NYSE's commission rates and had approved its fixed-rate structure. *Id.* at 682. There was accordingly a "plain repugnancy" between the antitrust laws, which treated price fixing as a *per se* violation, and the securities regulatory scheme, which tolerated some instances of price fixing. *Id.* Implied

antitrust immunity was necessary, the Court explained, because allowing the antitrust suit to proceed would have subjected the NYSE to conflicting standards of conduct and "unduly interfere[d] . . . with the operation of the Securities Exchange Act." *Id.* at 686.

NASD, decided the same day as *Gordon*, further defined the parameters of implied antitrust immunity. The Court concluded that an antitrust suit could not be brought to challenge agreements fixing the price of mutual funds. *NASD*, 422 U.S. at 694. Indeed, the alleged wrongdoing in *NASD* was very similar to that at issue here: The plaintiffs alleged, for example, that mutual fund underwriters and broker-dealers had entered into agreements requiring the broker-dealers to maintain the predetermined public offering price when selling mutual fund shares, thereby artificially inflating the price. *Id.* at 702 n.11. The Court held that the SEC had the power to authorize such price restraints under the Investment Company Act, 15 U.S.C. § 80a-22(f), and that—although the SEC had *not* actually exercised that power—antitrust immunity was required because there was "no way to reconcile the Commission's power to authorize these restrictions with the competing mandate of the antitrust laws." *NASD*, 422 U.S. at 722. In light of the SEC's authority to authorize conduct proscribed by the antitrust laws, these laws had to "give way" to ensure the viability of the mutual fund regulatory scheme established by the Investment Company Act. *Id.* at 729.

The Court further concluded that an antitrust claim could not be brought against the NASD for allegedly conspiring with its members to fix mutual fund prices because such a suit threatened to undermine the SEC's "extensive" "supervisory authority" over the NASD. *NASD*, 422 U.S. at 732. An antitrust action "pose[d] a substantial danger that [the NASD] would be subjected to duplicative and inconsistent standards." *Id.* at 735. Immunity was therefore necessary, the Court determined, in order to ensure that the SEC "could

carry out [its regulatory] responsibility free from the disruption of conflicting judgments that might be voiced by courts exercising jurisdiction under the antitrust laws." *Id.* at 734.

Gordon and *NASD* remain this Court's authoritative pronouncements on the implied repeal of the antitrust laws. Indeed, in *Trinko*, 540 U.S. 398, this Court recently reaffirmed that antitrust causes of action cannot coexist with pervasive regulatory schemes. Although *Trinko* was not an antitrust immunity case, the Court explicitly drew upon antitrust immunity principles to conclude that a plaintiff failed to state a claim under the Sherman Act in a suit alleging that an incumbent local exchange carrier had violated its obligations under the Telecommunications Act of 1996. *See id.* at 412 ("Just as regulatory context may in other cases serve as a basis for implied immunity, it may also be a consideration in deciding whether to recognize an expansion of the contours of § 2" of the Sherman Act) (citing *NASD*, 422 U.S. at 730-35). The Court explained that, where there is a regulatory structure in place to deter and remedy anticompetitive harm, "the additional benefit to competition provided by antitrust enforcement will tend to be small, and it will be less plausible that the antitrust laws contemplate such additional scrutiny." *Id.* Because the Federal Communications Commission took antitrust considerations into account in its regulatory decision-making, it was an "effective steward of the antitrust function," and, the Court concluded, a suit under the Sherman Act was therefore unavailable. *Id.* at 413.

2. The Second Circuit's holding that an antitrust claim can be brought challenging securities transactions directly regulated by the SEC and NASD cannot be reconciled with *Gordon*, *NASD*, or *Trinko*. Indeed, this case is virtually indistinguishable from *NASD*, where the Court held that alleged participants in a mutual fund price-fixing scheme were immune from an antitrust suit because the SEC *could have* authorized such price fixing (although it had not actually done so) and there accordingly existed the *possibility* of a

conflict between the regulatory regime and the antitrust laws. 422 U.S. at 722. Here, respondents are challenging alleged price manipulation in the aftermarket for IPO securities, an activity that the SEC has claimed the right to authorize. Pet. App. 64a. This potential conflict between the antitrust laws' blanket prohibition on price fixing and the securities regulatory regime's more nuanced approach compels the conclusion that Congress intended to revoke the antitrust laws because the availability of an antitrust suit would "unduly interfere" with the comprehensive and finely calibrated regulatory system to which the securities laws gave rise. *Gordon*, 422 U.S. at 686.

Contrary to *Gordon*'s teachings, however, the Second Circuit wholly discounted the disruptive effect that an antitrust suit would have upon the SEC's and NASD's regulatory regimes and upon firms' capital formation efforts. The Second Circuit instead placed significant emphasis upon its determination that the SEC could not *compel* petitioners to undertake the market manipulation alleged in this case and thereby impose a mandate inconsistent with the antitrust laws. Pet. App. 65a. Although the existence of such inconsistent obligations is a factor that weighs heavily in favor of a finding of implied repeal, it is not the *sine qua non* of antitrust immunity. *See Brown v. Pro Football, Inc.*, 518 U.S. 231, 244-45 (1996) ("This Court has implied antitrust immunities that extends beyond statutorily *required* joint action . . . .") (emphasis in original). Indeed, in *NASD*, this Court premised the existence of antitrust immunity upon a potential conflict between conduct *authorized*—not compelled—by the securities regulations and the requirements of the antitrust laws. 422 U.S. at 722.

The Second Circuit's decision also conflicts with this Court's conclusion in *NASD* that a "pervasive regulatory" regime impliedly repeals the antitrust laws. Just as the NASD is subject to the "extensive" "supervisory authority" of the SEC, *NASD*, 422 U.S. at 732, the securities dealings of

the underwriters and institutional investors sued in this antitrust suit are subject to pervasive regulation by the SEC and NASD. If the Second Circuit had correctly applied *NASD*, it would have recognized that Congress intended the securities expertise of the SEC and the SROs—not antitrust juries—to determine the propriety of alleged anticompetitive behavior in the securities industry. *See Brown*, 518 U.S. at 241, 242 (holding that labor law's implicit antitrust exemption barred an antitrust suit because allowing the suit to proceed would have "require[d] antitrust courts to answer a host of important practical questions about how collective bargaining . . . is to proceed," a matter best addressed by the experts at the National Labor Relations Board, rather than "nonexpert antitrust judges and juries").

If the Second Circuit's decision is left in place, it will expose underwriters and other broker-dealers to conflicting standards of conduct and destabilize the existing securities regulatory scheme, two developments that this Court expressly sought to avoid in *Gordon* and *NASD*. Indeed, IPO participants will be unwilling to face the uncertain risk of trebled antitrust liability. This Court should grant certiorari to resolve the profound conflict between the Second Circuit's decision and this Court's implied immunity jurisprudence.

III. THE DECISION BELOW CONFLICTS WITH OTHER CIRCUITS' ANTITRUST IMMUNITY DECISIONS.

It is also impossible to reconcile the Second Circuit's holding with decisions in which other circuits, faithfully applying this Court's antitrust immunity jurisprudence, have concluded that antitrust claims may not be premised upon alleged market manipulation by broker-dealers.

1. In *Schaefer v. First National Bank of Lincolnwood*, 509 F.2d 1287 (7th Cir. 1975), the Seventh Circuit held that an alleged conspiracy among a stock exchange and brokerage houses to manipulate stock prices could not be challenged

under the Sherman Act because "[p]rivate parties may only bring antitrust claims against an exchange or its members when there is no other vehicle for review." *Id.* at 1300. The court explained that the "sort of manipulation scheme underlying the plaintiffs' claim here was envisioned to be fully dealt with under the securities acts." *Id.* Because the plaintiffs could have brought a securities fraud claim concerning the alleged price manipulation, the Seventh Circuit concluded that an overlapping antitrust claim was unavailable. *Id.*

Similarly, in *Austin Municipal Securities, Inc. v. NASD, Inc.*, 757 F.2d 676 (5th Cir. 1985), the Fifth Circuit held that the antitrust laws are impliedly repealed as to the NASD disciplinary process because the SEC exercises extensive regulatory authority over the NASD. *Id.* at 695. The court warned that "[s]uperimposing the antitrust laws on the securities laws would unduly interfere with the SEC's jurisdiction" and "upset[] the balance of interests established by Congress in the Exchange Act." *Id.* The Fifth Circuit further recognized that the availability of an overlapping antitrust cause of action would disrupt the SEC's pervasive oversight of the NASD's operations and "thwart[] Congressional intent underlying the Exchange Act." *Id.*; *see also Harding v. Am. Stock Exch., Inc.*, 527 F.2d 1366, 1370 (5th Cir. 1976) (holding that an exchange's decision to delist a stock was immune from an antitrust suit because the decision was subject to SEC approval and immunity was therefore "necessary . . . to make the Exchange Act viable"); *Thill Sec. Corp. v. N.Y. Stock Exch.*, 633 F.2d 65, 70 (7th Cir. 1980) (holding that the New York Stock Exchange's antirebate rule, which prohibited a member from sharing a commission with nonmembers, was not subject to an antitrust challenge because the rule was part of the fixed-rate commission system approved by the SEC).

2. The Second Circuit's decision cannot be squared with the antitrust immunity analysis of the Seventh Circuit in

Schaefer, which appropriately applied this Court's teachings in *Gordon* and *NASD*. Indeed, the Second Circuit's holding that investors may bring an antitrust suit to challenge alleged market manipulation is wholly at odds with the Seventh Circuit's conclusion that price manipulation does not give rise to an antitrust cause of action if a remedy is available under the securities laws. *Schaefer*, 509 F.2d at 1300. Here, such a remedy is certainly available to respondents, as evidenced by the fact that another group of investors filed a securities fraud claim in the Southern District of New York concerning much of the same conduct at issue in this case. Pet. App. 2a.[2]

The Second Circuit's failure to take into account the destabilizing effect that the availability of an antitrust suit will have upon the securities regulatory framework is also inconsistent with the analysis in *Austin Municipal*, *Harding*, and *Thill*, each of which recognized that the securities laws impliedly repealed the antitrust laws and that Congress has acquiesced in the existing securities regulatory structure. Just as the availability of an antitrust suit challenging the NASD's disciplinary process in *Austin Municipal* would have "unduly interfere[d] with the SEC's jurisdiction" over the NASD's

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[2] Notably, the decision below is also inconsistent with earlier Second Circuit decisions concerning the scope of the antitrust immunity doctrine, and it therefore significantly disturbed the settled expectations of the regulated community, which—until the decision below—reasonably believed that the marketing of IPOs was governed by the securities statutes and regulations, not by the sometimes divergent requirements of the antitrust laws. *See In re Stock Exchs. Options Trading Antitrust Litig.*, 317 F.3d at 148 (dismissing a Sherman Act claim alleging that stock exchanges had conspired to limit the listing of securities to one exchange at a time, because the antitrust laws had been impliedly repealed in order "to preserve the authority of the SEC to regulate that conduct"); *Friedman v. Salomon/Smith Barney, Inc.*, 313 F.3d 796, 801 (2d Cir. 2002) (holding that underwriters were impliedly immune from an antitrust claim alleging the manipulation of aftermarket securities prices because the availability of an antitrust suit would "conflict with Congress's implicit determination that the SEC should regulate the alleged anti-competitive conduct").

activities, 757 F.2d at 695, an antitrust suit against underwriters and institutional investors based upon syndicate practices and alleged price manipulation would impede the ability of the SEC and NASD to fulfill their congressional mandate to regulate these activities themselves.

If the Second Circuit's decision remains undisturbed, the regulatory requirements with which market participants must comply will differ depending upon the circuit in which a suit is filed, in clear contravention of Congress's intention to "remove impediments to and perfect the mechanisms of a *national* market system for securities." 15 U.S.C. § 78b (emphasis added). Certiorari is warranted to preserve the uniformity of the securities regulatory regime and to reconcile the Second Circuit's erroneous understanding of antitrust immunity with that of other circuits that have properly heeded this Court's decisions in *Gordon* and *NASD*.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted.

THEODORE B. OLSON
Counsel of Record
F. JOSEPH WARIN
DOUGLAS R. COX
AMIR C. TAYRANI
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500

Counsel for Amicus Curiae

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IN THE

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CREDIT SUISSE SECURITIES (USA) LLC, ET AL.,

Petitioners,

v.

GLEN BILLING, ET AL.,

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Second Circuit

MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF AND BRIEF OF THE NATIONAL ASSOCIATION OF SECURITIES DEALERS, INC., AS *AMICUS CURIAE* SUPPORTING PETITIONERS

THEODORE B. OLSON
Counsel of Record
F. JOSEPH WARIN
DOUGLAS R. COX
AMIR C. TAYRANI
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500

Counsel for Amicus Curiae

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To The United States Court Of Appeals
For The Second Circuit

MOTION OF THE NATIONAL ASSOCIATION OF SECURITIES DEALERS, INC., FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF

Pursuant to this Court's Rule 37.3(b), the National Association of Securities Dealers, Inc., respectfully moves for leave to file the attached *amicus curiae* brief supporting petitioners. Letters signed by counsel for petitioners and counsel for respondent Glen Billing consenting to the filing of this brief have been lodged with the Court. Counsel for respondent Milton Pfeiffer has withheld consent to the filing of this brief.

The question presented in this case is whether a cause of action is available under the federal antitrust laws to challenge alleged collusive conduct and market manipulation in initial public offerings by underwriters and institutional investors. The National Association of Securities Dealers, Inc. ("NASD"), has a substantial interest in the resolution of this

question because the NASD has regulatory responsibilities that fall within, and extend beyond, the subject matter of this suit. The availability of an antitrust cause of action based on alleged collusion and market manipulation by broker-dealers would disrupt the NASD's carefully calibrated regulatory regime.

The NASD is a private Delaware corporation, functioning as a self-regulatory organization ("SRO") for its broker-dealer members, and is registered with the Securities and Exchange Commission ("SEC") as a national securities association pursuant to the 1938 Maloney Act Amendments to the Securities Exchange Act of 1934. 15 U.S.C. § 78o-3 *et seq.* The NASD and other SROs exercise front-line regulatory authority over the securities industry, subject to the stringent oversight of the SEC, which must approve nearly all SRO rules. For more than half a century, the NASD has been the primary regulatory body for the broker-dealer industry, and it closely regulates the market activities of the underwriters named as defendants in this antitrust suit. SEC Release No. 34-2211, 5 S.E.C. 627 (Aug. 7, 1939). The SEC has filed civil actions and the NASD has initiated disciplinary proceedings in response to the incidents of alleged price manipulation challenged in this case, including against several of the petitioners.

The NASD's regulatory responsibilities provide it with a unique perspective into the issues raised by this case and a profound awareness of the far-reaching consequences that would result from superimposing the antitrust laws on the securities regulatory framework. The Second Circuit's holding that investors may bring antitrust suits challenging alleged collusion and market manipulation by broker-dealers will create two conflicting systems of securities regulation: one overseen by the SEC and subject to the SEC's and NASD's expert decisions balancing competition and other goals; the other overseen by juries focusing solely on competition. The availability of an alternative securities regulatory

system under the antitrust laws will significantly disrupt the uniform national securities market that Congress intended to establish. The extensive litigation and crippling regulatory confusion that will inevitably result from the Second Circuit's decision will impede the SEC's and NASD's efforts to regulate the broker-dealer industry in a manner that promotes market stability and capital formation, and will harm the interests of millions of American investors.

For the foregoing reasons, the NASD respectfully requests that this Court grant its motion for leave to file the attached *amicus curiae* brief.

Respectfully submitted.

THEODORE B. OLSON
Counsel of Record
F. JOSEPH WARIN
DOUGLAS R. COX
AMIR C. TAYRANI
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500

Counsel for Amicus Curiae

January 22, 2007

QUESTION PRESENTED

Whether a cause of action is available under the federal antitrust laws, based upon alleged collusive conduct and price manipulation by underwriters and institutional investors in the national securities markets, where Congress has directed that the challenged conduct be subject to comprehensive regulation by the Securities and Exchange Commission and the National Association of Securities Dealers.

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OTHER AUTHORITIES

Battle of the Bourses—Financial Exchanges, Economist, May 27, 2006, at 65 14

NASD Manual, IM-2110-5 ..... 4, 8, 12

NASD, News Release: NASD Fines J.P. Morgan for Sharing in Profits from Hot IPOs (Feb. 20, 2003), *at* http://www.nasd.com/PressRoom/NewsReleases/2003NewsReleases/NASDW_002951 24

NASD, News Release: NASD Sanctions Investment Banks for IPO Violations (May 18, 2004), *at* http://www.nasd.com/PressRoom/NewsReleases/2004NewsReleases/NASDW_002829 24

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BRIEF OF THE NATIONAL ASSOCIATION OF SECURITIES DEALERS, INC., AS *AMICUS CURIAE* SUPPORTING PETITIONERS

INTEREST OF *AMICUS CURIAE*[1]

The question presented in this case is whether a cause of action is available under the federal antitrust laws to challenge alleged collusive conduct and market manipulation in initial public offerings by underwriters and institutional investors. The National Association of Securities Dealers, Inc. ("NASD"), has a substantial interest in the resolution of this question because the NASD has regulatory responsibilities that fall within, and extend beyond, the subject matter of this suit. The availability of an antitrust cause of action based on alleged collusion and market manipulation by broker-dealers would disrupt the NASD's carefully calibrated regulatory regime—a regime that, pursuant to a longstanding congressional plan, balances competition with other important market-related objectives; that provides ample guidance for participants in the initial public offering ("IPO") marketplace; and that includes broad authority to punish the misconduct of market participants.

The NASD is a private Delaware corporation, functioning as a self-regulatory organization ("SRO") for its broker-dealer members, and is registered with the Securities and Exchange Commission ("SEC") as a national securities association pursuant to the 1938 Maloney Act Amendments to the Securities Exchange Act of 1934. 15 U.S.C. § 78o-3 *et seq.*

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[1] Pursuant to this Court's Rule 37.6, *amicus* states that counsel for co-petitioner Bear, Stearns & Co., Inc., is also counsel for *amicus* in this matter, and that no person or entity other than *amicus*, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

The NASD and other SROs exercise front-line regulatory authority over the securities industry, subject to the stringent oversight of the SEC, which must approve nearly all SRO rules. For more than half a century, the NASD has been the primary regulatory body for the broker-dealer industry, and it closely regulates the market activities of the underwriters named as defendants in this antitrust suit. SEC Release No. 34-2211, 5 S.E.C. 627 (Aug. 7, 1939). Significantly, the SEC and NASD are statutorily required to consider competition—the goal of the antitrust laws—as one of several goals to be balanced when discharging their regulatory responsibilities. 15 U.S.C. § 77b(b); *id.* § 78o-3(b)(9). The SEC has filed civil actions and the NASD has initiated disciplinary proceedings in response to the incidents of alleged price manipulation challenged in this case, including against several of the petitioners.

The NASD's regulatory responsibilities provide it with a unique perspective into the issues raised by this case and a profound awareness of the far-reaching consequences that would result from superimposing the antitrust laws on the securities regulatory framework. The Second Circuit's holding that investors may bring antitrust suits challenging alleged collusion and market manipulation by broker-dealers will create two conflicting systems of securities regulation: one overseen by the SEC and subject to the SEC's and NASD's expert decisions balancing competition and other goals; the other overseen by juries focusing solely on competition. The availability of an alternative securities regulatory system under the antitrust laws will significantly disrupt the uniform national securities market that Congress intended to establish. The extensive litigation and crippling regulatory confusion that will inevitably result from the Second Circuit's decision will impede the SEC's and NASD's efforts to regulate the broker-dealer industry in a manner that promotes market stability and capital formation, and will harm the interests of millions of American investors.

STATEMENT

Investors who have suffered losses due to improper collusion and market manipulation by broker-dealers have several remedies at their disposal, including filing a securities fraud claim against the broker-dealers or initiating a complaint against them with the NASD or the SEC. An antitrust claim, however, is not among the available remedies.

When Congress enacted the securities laws, it impliedly repealed the antitrust laws as to market activities subject to pervasive SEC and SRO regulation and thereby immunized these activities from antitrust liability. Indeed, as this Court has recognized on at least two occasions, repeal of the antitrust laws "*must* be implied in order to permit the Exchange Act to function as envisioned by the Congress." *Gordon v. N.Y. Stock Exch., Inc.*, 422 U.S. 659, 688 (1975) (emphasis added); *see also United States v. NASD, Inc.*, 422 U.S. 694, 734 (1975).

The Second Circuit's contrary conclusion undermines the securities regulatory system and "poses a substantial danger that" market participants will "be subjected to duplicative and inconsistent standards" (*NASD*, 422 U.S. at 735) under the overlapping and often conflicting mandates of the securities and antitrust laws. This Court should reverse the Second Circuit's decision to ensure that the reticulated securities regulatory regime established by Congress, and the rules issued by the NASD and approved by the SEC, are not undermined by antitrust claims that impose inconsistent obligations on market participants and that are decided by juries lacking the SEC's and NASD's specialized knowledge of the securities markets.

1. The allegations in this case concern IPO activities of underwriting firms and institutional investors that are subject to extensive regulation by the SEC and NASD. Underwriters play an integral role in the IPO process, and thus in the capital formation process. In a "firm commitment" underwriting,

they purchase securities from an issuing corporation at a predetermined price and then resell the securities to institutional investors and members of the public at a higher price. Pet. App. 4a. To mitigate the risk inherent in the IPO process, underwriters form "syndicates" with other firms, which jointly underwrite a security. Pet. App. 5a. The NASD regulates syndicate operations. *See, e.g.*, NASD Rule 2710: Corporate Financing Rule—Underwriting Terms and Arrangements.

An underwriter has a strong stake in the success of the securities that it markets because, among other things, price increases that occur in the aftermarket—the period after an IPO is first distributed—augment the benefit to its customers and the likelihood that the firm will be hired to underwrite future IPOs. Pet. App. 8a. The NASD has issued rules that establish the boundary between lawful activities designed to maintain a security's price and improper efforts to manipulate price through collusion with other broker-dealers. *See, e.g.*, NASD Manual, IM-2110-5: Anti-Intimidation/ Coordination.[2] Activities permitted under these rules are essential to the capital formation process and to the ability of broker-dealers to respond quickly and innovatively to unfavorable market conditions. Indeed, without the ability to maintain the prices of securities in the initial aftermarket, the price of many IPOs would drop swiftly and precipitously—harming investors and the national economy—because many investors who purchase IPOs attempt to make a quick profit by selling their shares immediately after a company goes public. These rules afford underwriters the flexibility to maintain

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[2] The SEC has also promulgated extensive regulations—most notably, Regulation M—that draw a precise line between permissible and impermissible efforts to maintain a security's price. *See, e.g.*, 17 C.F.R. § 242.104(b) (prohibiting activities to peg a security's price, "except for the purpose of preventing or retarding a decline in the market price of a security").

the prices of securities in the immediate aftermarket—without engaging in long-term price manipulation—and thus enable the NASD to further the statutory objective of "protect[ing] investors and the public interest." 15 U.S.C. § 78o-3(b)(6).

2. Respondents challenged the validity of activities within the syndicate regulatory framework and several incidents of alleged market manipulation by filing an antitrust suit in the United States District Court for the Southern District of New York against a number of major underwriters and institutional investors. Pet. App. 72a. One group of respondents filed suit under section 1 of the Sherman Act, 15 U.S.C. § 1, while another group initiated a class action alleging violations of section 2(c) of the Robinson-Patman Act. *Id.* § 13(c). Both sets of claims challenged the validity of syndicate arrangements used to market IPOs and alleged that underwriting firms and institutional investors had conspired to inflate the aftermarket price of a number of technology securities that went public in the late 1990s. Pet. App. 17a-20a.

The SEC submitted an *amicus* brief urging the district court to dismiss respondents' claims. Pet. App. 124a. The SEC argued that the antitrust laws had been impliedly repealed in this area because the securities transactions at issue were subject to comprehensive SEC and NASD oversight and that respondents' "attempts to remedy th[eir] claims through the antitrust laws threaten to disrupt the Commission's regulatory regime." Pet. App. 128a n.1.

The district court dismissed the case in its entirety. Pet. App. 121a. Relying upon this Court's decisions in *Gordon v. New York Stock Exchange, Inc.*, 422 U.S. 659, and *United States v. NASD, Inc.*, 422 U.S. 694, the court concluded that respondents' allegations did not state a valid antitrust claim because—at least as to the market activities challenged in this suit—the antitrust laws have been impliedly repealed by the federal securities laws. Pet. App. 73a. The court concluded that "the SEC, both directly and through its pervasive over-

sight of the NASD and other SROs, either expressly permits the conduct alleged . . . or has the power to regulate the conduct," and accordingly that a "failure to find implied immunity would conflict with [the] overall regulatory scheme." Pet. App. 119a (internal quotation marks omitted).

3. The Second Circuit reversed. Based upon its interpretation of *Gordon* and *NASD*, the court developed a fact-intensive four-pronged test for determining whether the antitrust laws have been impliedly repealed. Pet. App. 57a. The Second Circuit's novel framework—which had not been applied by any court, including the Second Circuit, in earlier antitrust immunity cases (*see, e.g.*, *In re Stock Exchs. Options Trading Antitrust Litig.*, 317 F.3d 134 (2d Cir. 2003))—considers the securities laws' legislative history, whether the antitrust and securities laws could impose conflicting mandates on regulated persons, whether application of the antitrust laws would nullify a provision of the securities laws, and the frequency with which the SEC and NASD regulate the anticompetitive conduct. Pet. App. 57a.

The Second Circuit concluded that Congress had not intended an implied repeal of the antitrust laws in this factual setting because the securities laws' legislative history yielded no explicit evidence of Congress's intention to do so. Pet. App. 64a. The Second Circuit also emphasized that respondents had failed to identify a provision of the securities laws that would be nullified by the availability of antitrust relief and that the SEC had not explicitly authorized the anticompetitive agreements alleged by respondents. Pet. App. 65a-66a. Refusing to credit the arguments raised by the SEC as *amicus curiae*, the court dismissed as irrelevant the extensive securities regulatory regime with which underwriters and institutional investors must comply. Although the Second Circuit conceded that "their conduct may be subject to regulation and control by the SEC in great detail," it did not accord that factor any weight in its analysis because petitioners had not

received explicit authorization to engage in the market manipulation of which they stand accused. Pet. App. 69a.

After a petition for certiorari was filed, the Court called for the Solicitor General's views on the case. The United States took the position that dismissal on antitrust immunity grounds is warranted if the alleged conduct is either authorized under the securities laws or inextricably intertwined with such authorized activities. Cert.-Stage U.S. Br. at 8. The United States emphasized that the Second Circuit's failure to afford immunity to activities inextricably intertwined with permissible collaborative conduct by broker-dealers would vitiate the immunity afforded to authorized activities and generate conflict between the overlapping antitrust and securities regulatory regimes. *Id.* at 11. The United States concluded that certiorari, and reversal of the decision below, were warranted because the Second Circuit's cramped view of antitrust immunity threatened to undermine the system of securities regulation and impede the capital formation process. *Id.* at 9.

This Court granted certiorari on December 7, 2006.

SUMMARY OF ARGUMENT

The NASD possesses a unique regulatory vantage point, informed by extensive institutional knowledge about the complex workings of the securities markets. From the NASD's perspective, the Second Circuit's decision should be reversed to prevent the disruption of the comprehensive and uniform regulatory system established by the federal securities laws.

The Second Circuit's decision allowing respondents' antitrust suit to proceed is fundamentally inconsistent with the regulatory regime that Congress established when enacting the securities laws. Congress intended for the regulation of the securities markets to rest with an expert agency, the SEC, and with the expert SROs, including the NASD, that operate under the SEC's close regulatory oversight. Pursuant to this

regulatory authority, the SEC and SROs have established a carefully reticulated securities regulatory regime that—unlike the antitrust laws—promotes both competition and other, perhaps conflicting, interests, including market stability and capital formation. 15 U.S.C. § 77b(b). For example, the SEC and NASD have issued rules that authorize certain types of price stabilization and coordinated activity by underwriters, while forbidding others. *See, e.g.*, 17 C.F.R. § 242.104; NASD Manual, IM-2110-5: Anti-Intimidation/Coordination; NASD Rule 2770: Disclosure of Price in Selling Agreements. Moreover, to safeguard the capital formation process, the SEC and NASD modify their rules when needed to respond to rapidly changing market conditions. The availability of an antitrust cause of action to challenge alleged price manipulation and coordination by broker-dealers subjects the regulated community to conflicting standards of conduct and vests antitrust juries with significant authority over the operations of the securities markets. It was precisely to avoid such regulatory uncertainty and inexpert decision-making that Congress impliedly repealed the antitrust laws in this area when enacting the Exchange Act and Securities Act.

As this Court made clear in *Gordon v. New York Stock Exchange, Inc.*, 422 U.S. 659 (1975), and *United States v. NASD, Inc.*, 422 U.S. 694 (1975), and recently reiterated in *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004), the antitrust laws are impliedly repealed if there is a pervasive regulatory regime in place, or if a potential conflict between the antitrust laws and securities laws exists. In this case, the market activities of all broker-dealers—including syndicate relationships between underwriters and price-maintenance activities—are comprehensively regulated by the SEC and NASD, and therefore impliedly immune from antitrust liability. The Second Circuit's analysis of implied immunity not only disregards the SEC's and NASD's extensive regulation of the securities industry, but also contradicts this Court's instruction that anti-

trust immunity should be implied whenever a *potential* conflict exists between the securities and antitrust laws. The Second Circuit's emphasis on whether a *specific* conflict exists between the securities and antitrust laws is significantly underinclusive and would allow antitrust suits to proceed regarding many activities subject to comprehensive regulation by the SEC and NASD. The proposal of the United States that antitrust immunity be implied for activities explicitly authorized by the securities laws and conduct inextricably intertwined with such activities is similarly underinclusive. Only a holding that *all* activities pervasively regulated by the securities laws are impliedly immune from antitrust liability will vindicate Congress's intention to establish a uniform and stable securities market subject to the expert oversight of the SEC and NASD.

The decision below should be reversed.

ARGUMENT

I. THE DECISION BELOW UNDERMINES THE SECURITIES REGULATORY SYSTEM AND THE NASD'S PERVASIVE REGULATION OF THE IPO PROCESS.

The SEC and NASD closely regulate the underwriting activities upon which respondents' antitrust allegations are premised. Both the SEC and NASD have brought their expertise to bear regarding the permissible range of underwriting activities, and have promulgated a detailed set of regulations governing the IPO process. The regulations are periodically modified in response to changing market conditions. Unlike the antitrust laws, the goal of these regulations is not simply to encourage competition, but also to facilitate capital formation and to protect investors and the market system. In order to promote market stability and capital formation, the SEC and NASD sometimes authorize conduct that might be deemed anticompetitive and illegal under the antitrust laws.

For this reason, the two incompatible regulatory regimes cannot be used to police the same market activities.

A. The NASD Regulates The Broker-Dealer Industry In Order To Promote Competition As Well As Market Stability And Capital Formation.

The NASD stands on the frontline of securities regulation and congressional efforts to "creat[e] . . . a national securities market." National Securities Markets Improvement Act of 1996, Pub. L. No. 104-290, § 102, 110 Stat. 3416, 3418. As an SRO, the NASD monitors its members' compliance with the securities laws and with its own rules in order "to remove impediments to and perfect the mechanisms of a national market system for securities." 15 U.S.C. § 78b; *see also id.* § 78o-3(b)(6). The SEC, in turn, closely oversees the NASD's regulatory activities and promulgates regulations applicable to all market participants.

The SEC and NASD are statutorily required to take competition into account during their regulatory decision-making. Indeed, it is a prerequisite to the NASD maintaining registration as a national securities association that the SEC find that its rules "do not impose any burden on competition not necessary or appropriate." 15 U.S.C. § 78o-3(b)(9); *see also, e.g., id.* § 77b(b) ("Whenever . . . the Commission is . . . required to consider or determine whether an action is necessary or appropriate in the public interest, the Commission shall also consider, in addition to the protection of investors, whether the action will promote efficiency, competition, and capital formation."). As the legislative history to the 1975 Securities Act Amendments explains, however, "[t]his explicit obligation to balance, against other regulatory criteria and considerations, the competitive implications of self-regulatory and Commission action should *not* be viewed as requiring the Commission to justify that such actions be the least anti-competitive manner of achieving a regulatory ob-

jective." S. Rep. No. 94-75, at 13-14 (1975), *reprinted in* 1975 U.S.C.C.A.N. 179, 191-92 (emphasis added).

The legislative history reflects the fact that competition is not the only consideration relevant to the SEC's and NASD's regulatory policies. Other objectives of the securities laws include the promotion of capital formation and a stable securities market. *See* 15 U.S.C. § 80a-2(c). Establishing a vigorous capital formation process and a stable market sometimes requires conduct that could be deemed anticompetitive under the antitrust laws, which may include, for example, the type of aftermarket price maintenance at issue in this case.

Thus, although competition is an important—and statutorily mandated—consideration in the securities regulatory system, the SEC and NASD are required to balance competitive interests against other considerations, in order to develop the regulatory strategy most likely to foster a "national market system," "promote just and equitable principles of trade," and "protect investors and the public interest." 15 U.S.C. § 78o-3(b)(6). In contrast, the antitrust laws are primarily focused on competition (*State Oil Co. v. Khan*, 522 U.S. 3, 15 (1997)), and therefore cannot be reconciled with the broader objectives of the securities regulatory regime, which balances competitive considerations against other equally important values.

Indeed, this Court itself has already recognized that inconsistent standards of conduct "are likely to result [from application of the antitrust laws to securities transactions] because the sole aim of antitrust legislation is to protect competition, whereas the SEC must consider, in addition, the economic health of the investors, the exchanges, and the securities industry." *Gordon*, 422 U.S. at 689.

B. The NASD Closely Regulates Its Members' Participation In The IPO Process.

Against this regulatory backdrop, the NASD is responsible for overseeing its members' participation in the IPO proc-

ess and disciplining members who engage in prohibited market activities. *See, e.g.*, NASD Rule 2790: Restrictions on the Purchase and Sale of Initial Equity Public Offerings. The NASD's regulation of broker-dealers requires it to enforce nuanced distinctions between permissible joint activities and improper collusive arrangements, and between lawful efforts to stabilize a security's price and impermissible instances of price manipulation.

Although coordination among underwriting syndicates is generally a permissible means of effecting an IPO distribution, *see* SEC Release No. 34-17,371, 45 Fed. Reg. 83,707 (Dec. 19, 1980), the NASD has developed extensive rules concerning syndicates' operations. *See, e.g.*, NASD Rule 2710: Corporate Financing Rule—Underwriting Terms and Arrangements (requiring underwriting compensation to be fair and reasonable); NASD Rule 2770: Disclosure of Price in Selling Agreements (requiring the disclosure of the public selling price in syndicate agreements). The NASD has also issued rules that establish the boundary lines between permissible and impermissible price control during the IPO process. *See, e.g.*, NASD Manual, IM-2110-5: Anti-Intimidation/Coordination ("It is conduct inconsistent with just and equitable practices of trade" for an underwriter "to coordinate [its] prices . . . with any other [NASD] member," except "to the extent permitted by the federal securities laws"). These NASD rules must be designed to "protect investors," 15 U.S.C. § 78o-3(b)(6), and have been explicitly approved by the SEC.

These NASD regulations are reinforced by additional guidance from the SEC, which has promulgated its own regulations distinguishing acceptable and unacceptable means of maintaining a security's price. Although the securities regulatory system generally looks with disfavor on price manipulation, 15 U.S.C. § 78i(a), the SEC has not instituted a blanket prohibition on all such activities. For example, SEC Regulation M does not allow quid pro quo arrangements or

aftermarket price stabilization, *except* to prevent or slow a decline in price. Pet. App. 103a-04a; 17 C.F.R. §§ 242.101, 242.104. The flexibility to undertake such stabilization activities, in the SEC's expert judgment, is necessary to the success of the capital formation process. *See* Anti-Manipulation Rules Concerning Securities Offerings, 62 Fed. Reg. 520, 521 (Jan. 3, 1997). Moreover, an underwriter may gather information from a potential investor regarding its "desired long-term future position in the security" and the prices at which the investor would hold or sell its shares in the immediate aftermarket, Pet. App. 224a, but may not "inquire[] whether the customer intends to place orders in the immediate aftermarket, and if so, at what prices and quantities." Pet. App. 227a-28a. The SEC has also delineated the factors a firm may consider when determining how to allocate IPO shares, making clear that the securities laws do not "prohibit a firm from allocating IPO shares to a customer because the customer has separately retained the firm for other services," so long as the customer has "not paid excessive compensation." SEC Release No. 33-8511, 69 Fed. Reg. 75,774, 75,785 (Dec. 17, 2004).

The SEC and NASD rules governing the IPO process enable underwriters to manage the risk inherent in that process, as well as to stabilize prices and prevent market fluctuations that impede the accumulation of capital and harm investors. This regulatory regime affords market participants the flexibility to develop innovative responses to swiftly changing market conditions. Without the benefit of such flexibility, the IPO process would be inefficient, unstable, and uncertain because underwriters would lack the tools to gather information necessary to make an initial offering to investors and to ensure the success of the offering once it has been made.[3]

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[3] Such instability and uncertainty may compel both American and multinational companies to go public in foreign countries that provide a more stable and efficient regulatory framework for the IPO process. Although it

Superimposing antitrust law—with its single-minded focus on competition—on the existing securities regulatory framework would profoundly disrupt the congressional plan, and the efforts of the SEC and NASD under that plan to strike the appropriate balance among competition, capital formation, and market stability. Unlike the rigid antitrust laws, the comparatively flexible securities laws tolerate some degree of anticompetitive conduct when necessary to promote the national market system or protect the interests of investors. In order to vindicate Congress's intentions when enacting the securities laws and designing the carefully calibrated system for regulating the securities markets, the propriety of petitioners' conduct must therefore be evaluated by the SEC and NASD under the lens of the securities regulatory regime, rather than by juries struggling to reconcile the conflicting mandates of the antitrust and securities laws.

II. THE ANTITRUST LAWS ARE REPEALED AS TO ALL ACTIVITIES PERVASIVELY REGULATED BY THE SECURITIES LAWS.

Under this Court's antitrust immunity jurisprudence, the antitrust laws are repealed as to all activities subject to the comprehensive regulation of the securities laws. Because the Second Circuit's decision overlooked the relevance of the extensive securities regulatory regime and instead inquired into the existence of a direct conflict between the securities and antitrust laws, it flatly contradicts this Court's precedent.

[Footnote continued from previous page]

is a complex question, driven by many variables, the Nation's IPO markets face vigorous competition from foreign markets. *See, e.g.*, *Battle of the Bourses—Financial Exchanges*, Economist, May 27, 2006, at 65 ("In 2000 nine out of every ten dollars in the world's initial public offerings were raised in America. [In 2005] nine out of every ten dollars were raised outside America . . . .").

A. This Court's Decisions In *Gordon* And *NASD* Establish That The Antitrust Laws Cannot Be Applied To Conduct Subject To Comprehensive Regulation By The Securities Laws.

This Court has held that the antitrust laws are impliedly repealed whenever an activity is subject to pervasive regulation under another statutory framework, or where there is a potential conflict between the antitrust laws and another legal regime.

In *Gordon*, this Court held that the New York Stock Exchange ("NYSE") possessed implied antitrust immunity from a Sherman Act suit challenging its fixed-rate commission structure. 422 U.S. at 691. The Court's analysis emphasized that the SEC exercised regulatory authority over the NYSE's commission rates and had approved its fixed-rate structure. *Id.* at 682. There was accordingly a "plain repugnancy" between the antitrust laws, which treated price fixing as a *per se* violation, and the securities regulatory regime, which tolerated some instances of price fixing. *Id.* Implied antitrust immunity was necessary, the Court explained, because allowing the antitrust suit to proceed would have subjected the NYSE to conflicting standards of conduct and "unduly interfere[d] . . . with the operation of the Securities Exchange Act." *Id.* at 686.

In *NASD*, decided the same day as *Gordon*, this Court held that an antitrust suit could not be brought challenging agreements fixing the price of mutual funds. 422 U.S. at 694. The allegations in *NASD* are very similar to those at issue in this case: The plaintiffs alleged certain horizontal combinations among the members of the NASD as well as a variety of vertical arrangements that affected the price of mutual fund shares. *Id.* at 702. For example, the plaintiffs alleged that mutual fund underwriters and broker-dealers had entered into agreements requiring the broker-dealers to maintain the pre-

determined public offering price when selling mutual fund shares, thereby artificially inflating the price. *Id.* at 702 n.11. The Court held that the SEC had the power to authorize such price restraints under the Investment Company Act, 15 U.S.C. § 80a-22(f), and that—although the SEC had *not* exercised that authority—antitrust immunity was required because there was "no way to reconcile the Commission's power to authorize these restrictions with the competing mandate of the antitrust laws." *NASD*, 422 U.S. at 722. Because the SEC had the authority to authorize conduct proscribed by the antitrust laws, these laws had to "give way" to ensure the viability of the mutual fund regulatory scheme established by the Investment Company Act. *Id.* at 729.

Turning to the allegations involving horizontal agreements between the NASD and its members, the Court began by acknowledging that the activities in question were "neither required . . . nor authorized" under the Investment Company Act. *NASD*, 422 U.S. at 730. The Court thus inquired "whether the SEC's exercise of regulatory authority . . . is sufficiently pervasive to confer an implied immunity." *Id.* The Court recognized that the "SEC, in its exercise of authority over association rules and practices, is charged with protection of the public interest as well as the interests of shareholders, and it repeatedly has indicated that it weighs competitive concerns in the exercise of its continued supervisory responsibility." *Id.* at 732-33 (citations omitted). The Court concluded that "implied repeal of the antitrust laws" was therefore "necessary to make the [regulatory scheme] work" because the "maintenance of an antitrust action for activities so directly related to the SEC's responsibilities poses a substantial danger . . . [of] duplicative and inconsistent standards." *Id.* at 734, 735 (first alteration in original; internal quotation marks omitted).

Recently, the relevance of a detailed regulatory regime to antitrust immunity analysis was reaffirmed in *Trinko*. 540 U.S. 398. Although *Trinko* was not an antitrust immunity

case, the Court explicitly drew upon antitrust immunity principles to conclude that a plaintiff failed to state a claim under the Sherman Act in a suit alleging that an incumbent local exchange carrier had violated its obligations under the Telecommunications Act of 1996. *See id.* at 412 ("Just as regulatory context may in other cases serve as a basis for implied immunity, it may also be a consideration in deciding whether to recognize an expansion of the contours of § 2" of the Sherman Act) (citing *NASD*, 422 U.S. at 730-35). The Court explained that, where there is a regulatory structure in place to deter and remedy anticompetitive harm, "the additional benefit to competition provided by antitrust enforcement will tend to be small, and it will be less plausible that the antitrust laws contemplate such additional scrutiny." *Id.* Because the Federal Communications Commission ("FCC") took antitrust considerations into account in its regulatory decision-making, it was an "effective steward of the antitrust function," and a suit under the Sherman Act was therefore unavailable. *Id.* at 413.

Respondents' antitrust claims must be dismissed under *Gordon*, *NASD*, and *Trinko*. Antitrust law, the primary goal of which is to foster competition, cannot be used to regulate activities also subject to the federal securities laws, which, in order to further the goals of market stability and capital formation, authorize conduct that might be deemed anticompetitive under antitrust principles. As in *Gordon*, which found that antitrust immunity was appropriate because the Exchange Act left the fixing of rates of commission to the SEC, 422 U.S. at 691, here, SEC and NASD regulations permit certain types of coordinated activity among underwriters and investors that might be proscribed by the antitrust laws, and thus "failure to imply repeal [of those laws] would render nugatory" these aspects of the securities regulatory regime. *Id.*

Moreover, even in the absence of these regulations, *NASD* and *Trinko* make clear that antitrust immunity is necessary to effectuate the SEC's and NASD's comprehensive

regulation of the IPO process. *NASD*, 422 U.S. at 734; *see also Trinko*, 540 U.S. at 406. Just as the NASD is subject to the "extensive" "supervisory authority" of the SEC, *NASD*, 422 U.S. at 732, the market activities of the underwriters and institutional investors sued in this antitrust suit are subject to pervasive regulation by the SEC and NASD. Congress intended the securities experts of the SEC and SROs—not individual cases—to determine the propriety of alleged anticompetitive behavior in this regulatory setting. *Cf. Brown v. Pro Football, Inc.*, 518 U.S. 231, 240-41, 242 (1996) (holding that labor law's implicit antitrust exemption barred an antitrust suit because allowing the suit to proceed would have "require[d] antitrust courts to answer a host of important practical questions about how collective bargaining . . . is to proceed," which is a matter best addressed by the experts at the National Labor Relations Board, rather than "nonexpert antitrust judges and juries").

Implied immunity does not mean, however, that competitive considerations will be disregarded or undervalued in the securities markets. Just as the FCC was an "effective steward" of the antitrust function in *Trinko*, 540 U.S. at 413, the SEC and NASD are required to take competitive considerations into account when regulating the securities markets. Application of the antitrust laws in the securities setting is therefore unnecessary and inappropriate because the SEC and NASD promulgate rules and develop policies that promote competition in the securities markets—to the extent that competition is consistent with the other objectives on which the securities regulatory system is premised.

B. The Second Circuit's Approach To Implied Immunity Is Significantly Underinclusive.

The Second Circuit's decision disregards *NASD*'s teachings regarding the significance of pervasive regulation to implied immunity analysis, and, if affirmed, would profoundly disrupt the regulatory efforts of the SEC and NASD.

The Second Circuit applied an entirely novel test for implied antitrust immunity that places undue emphasis on the search for a *specific* conflict between the securities and antitrust laws. The court examined *Gordon* and identified four factors that this Court had purportedly considered as part of its antitrust immunity inquiry. Pet. App. 57a. Applying the factors that it had distilled from *Gordon* to respondents' complaint, the court first explained that the legislative history contained no specific discussion of the immunization of the types of coordinated activity and price maintenance alleged in this case. Pet. App. 64a. The court also pointed to the absence of an argument by petitioners that "the [SEC] could *compel* the anticompetitive conduct." Pet. App. 65a (emphasis added). The court further noted that it could not identify a single point of specific conflict between the antitrust laws and a "particularized grant of power to the [SEC]" to regulate IPO activities. Pet. App. 65a-66a. Finally, the court explained that there had never been any SEC authorization of the conduct alleged in this suit. Pet. App. 66a. On this basis, it concluded that this Court's precedents do not support immunity in this case. Pet. App. 67a.

The Second Circuit's antitrust immunity analysis cannot be reconciled with *Gordon* or *NASD*, and excludes significant amounts of conduct that should be shielded from antitrust liability. *Gordon* makes clear that a court must take into account the disruptive effect that an antitrust suit would have upon the SEC's and NASD's regulatory regimes and upon firms' capital formation efforts. 422 U.S. at 686. By narrowing the field of inquiry to the question whether the anticompetitive behavior was *specifically* addressed in the legislative history, in the statutory text, or by the past enforcement activities of the SEC, the Second Circuit has condoned respondents' "undu[e] interfere[nce] . . . with the operation of the Securities Exchange Act" through the imposition of an antitrust overlay on the already comprehensive securities regulatory regime. *Id.*

Indeed, the Second Circuit's decision wholly disregards *NASD*'s discussion of the significance of pervasive regulation to antitrust immunity analysis. *See Trinko*, 540 U.S. at 406 (citing *NASD*, 422 U.S. at 694). By allowing the antitrust laws to be used to regulate conduct already subject to the extensive securities law framework, the Second Circuit's decision creates the possibility that participants in the securities markets will be subjected to "duplicative and inconsistent standards," *NASD*, 422 U.S. at 735, under the antitrust and securities laws.[4]

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[4] The Second Circuit's decision itself provides an example of the inconsistent standards that will inevitably result from authorizing antitrust suits concerning activities regulated by the SEC and NASD. The Second Circuit asserted that the "[SEC] has consistently limited the definition of 'stabilization' to stabilizing activities that maintain securities prices or retard their decline, not manipulations that raise prices." Pet. App. 66a. This statement is incorrect. First, activities designed to retard the decline of prices are inherently activities that raise prices. Second, the SEC has expressly authorized underwriters to enter into agreements with an issuer to provide for an "overallotment option." Such an option, known as a "Green Shoe" option, allows underwriters "the right, but not the obligation, to purchase securities from the issuer in addition to those initially underwritten by the syndicate, which may constitute up to 15% of the initial underwritten amount." Trading Practices Rules Concerning Securities Offerings, 61 Fed. Reg. 17,108, 17,124 n.86 (Apr. 18, 1996). An underwriter may need to exercise such an option because it has chosen to "oversell" the offering and must then purchase additional shares to cover that short position. The SEC has explicitly authorized the underwriter to purchase up to 15% more shares from the original issuer, rather than on the open market. Accordingly, such 15% allocations are always lawful when they occur.

The SEC has explained that these types of "syndicate covering transactions can . . . enable underwriters to support the aftermarket price of the offered security at levels that they may not obtain in the absence of their activity, thereby interfering with free market forces." SEC Release No. 33-8511, 69 Fed. Reg. 75,774, 75,781 (Dec. 17, 2004). When considering amendments to Regulation M, the SEC did not forbid such practices, although it acknowledged that the covering of syndicate short positions

NASD demonstrates that antitrust immunity cannot be limited to those activities that are premised on specific regulatory authorizations. Under the Second Circuit's reading of this Court's precedent, however, antitrust law would become a sword of Damocles hanging over the securities industry. Any market activities that are consistent with the securities laws but have not yet been specifically authorized by the SEC or NASD could potentially be challenged under the antitrust laws. Conduct that could promote market stability and capital formation would inevitably be chilled by the alarming prospect of treble damages assessments under the antitrust laws.

The Second Circuit's approach to antitrust immunity is also inconsistent with the system of cooperative self-regulation that governs the securities markets. The NASD and other SROs operate under broad grants of authority from Congress. SRO functions thus frequently cannot be linked to a specific statutory provision. These grants of open-ended authority from Congress afford SROs the flexibility necessary to propose new rules, based on their front-line regulatory experiences, that respond to evolving industry practices and that promote the effective functioning of the capital markets. *See, e.g.*, 15 U.S.C. § 78o-3(b)(2) (broadly delegating to the NASD the power, *inter alia*, to "enforce compliance by its members and persons associated with its members, with the provisions of this chapter"). The Second Circuit's requirement that specific statutory language conflict with the antitrust laws in order to trigger immunity will undermine SROs' ability to respond to changing market conditions in a timely and innovative fashion. Just as threatening underwriters and broker-dealers with antitrust liability would severely impair

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through this mechanism "can allow the syndicate to price the offering more aggressively . . . and support the aftermarket at prices around or above the offering price." *Id.* at 75,780.

the strength and stability of the capital markets, the Second Circuit's novel approach to antitrust immunity would impede the NASD's ability to perform more generally the important responsibilities it possesses within the congressional scheme, and those delegated to it by the SEC.

C. The Test For Implied Immunity Advocated By The United States Is Similarly Underinclusive.

The test articulated by the United States is also legally flawed. By focusing on authorized activities, and activities "inextricably intertwined" with expressly permitted conduct, the United States would narrow the implied immunity recognized in this Court's decisions and provide inadequate scope to the securities industry.

Although the test suggested by the United States is broader than that advanced by the Second Circuit, it still places undue emphasis on whether particular actions are explicitly authorized by the securities laws. It thus limits the range of market activities in which investors are likely to engage to those authorized in unambiguous terms by the securities laws and compels market participants to forgo other—legal—activities for fear that a court might find that an action was not authorized by those laws. The standard advocated by the United States therefore conflicts with Congress's intention to use broad grants of regulatory authority to foster innovative efforts by market participants and regulators to develop capital and promote competition. Parsing the securities laws into isolated and unrelated grants of authority would severely undermine the capital formation process by limiting the flexibility needed to respond to rapidly changing market conditions, and would substantially compromise the SEC's and NASD's regulation of the securities markets.

Moreover, the test proposed by the United States is likely to breed extensive litigation regarding its applicability in specific factual situations and to encourage artful pleading by

antitrust plaintiffs. Because the standard requires that a complaint allege antitrust violations premised on activities that are neither authorized by the securities laws nor intertwined with authorized activities, determining whether a defendant is entitled to immunity will require a lengthy, fact-intensive comparison of the conduct alleged in the complaint and the scope of activity authorized by the securities laws. Once the parameters of antitrust immunity have become relatively clear, plaintiffs will be able to plead around the immunity hurdle by simply alleging that a defendant engaged in conduct that was not authorized by the securities laws or closely related to authorized activity. In order to neutralize the uncertainties of the litigation process and the possibility of a treble damages assessment, defendants are likely to settle these antitrust suits or forgo altogether economically beneficial market activities not explicitly authorized by the securities laws.

Under the test urged herein, such economically disadvantageous compromises are unnecessary because market participants can be certain that any securities-related activities subject to regulation under the securities laws are immune from antitrust liability. At the same time, competition is safeguarded by the SEC's and NASD's "effective steward[ship] of the antitrust function." *Trinko*, 540 U.S. at 413.

D. A Remedy For Improper Market Activities Must Be Sought Under The Securities Laws Or Through Enforcement Actions By The SEC Or NASD.

The implied repeal of the antitrust laws for market activities pervasively regulated by the SEC and NASD does not leave aggrieved parties without a remedy or the markets without protection. Investors who allege that they have been injured by price manipulation may file a federal securities fraud claim (as another group of plaintiffs did concerning the very conduct at issue here (Pet. App. 2a)). Investors may also

submit a complaint to the NASD, which may, in turn, initiate disciplinary action against one or more of its broker-dealer members. Allowing investors to pursue an antitrust claim against underwriters and institutional investors will needlessly—and dangerously—undermine the SEC's and NASD's enforcement-related decision-making and unsettle the existing, highly detailed regulatory framework. *See Town of Concord v. Boston Edison Co.*, 915 F.2d 17, 22 (1st Cir. 1990) (Breyer, C.J.) ("where regulatory and antitrust regimes coexist, antitrust analysis must sensitively recognize and reflect the distinctive economic and legal setting of the regulated industry to which it applies") (internal quotation marks and citations omitted).

The SEC and NASD have brought their regulatory expertise to bear regarding the alleged price manipulation that is also the subject of this suit. Indeed, the SEC filed civil actions and the NASD initiated disciplinary proceedings against several petitioners for the very conduct at issue in this case. *See, e.g., SEC v. Robertson Stephens, Inc.*, No. 03-00027 (D.D.C. Jan. 10, 2003) (consent judgment against Robertson Stephens, Inc., based upon allegation that it entered into anticompetitive arrangements with technology IPO customers); *SEC v. Credit Suisse First Boston Corp.*, No. 02-00090, 2002 WL 479836 (D.D.C. Jan. 29, 2002) (consent decree enjoining Credit Suisse from engaging in improper IPO-related conduct); NASD, News Release: NASD Fines J.P. Morgan for Sharing in Profits from Hot IPOs (Feb. 20, 2003), *at* http://www.nasd.com/PressRoom/NewsReleases/2003NewsReleases/NASDW_002951; NASD, News Release: NASD Sanctions Investment Banks for IPO Violations (May 18, 2004), *at* http://www.nasd.com/PressRoom/NewsReleases/2004NewsReleases/NASDW_002829. The NASD is also considering several rule amendments to address incidents of price manipulation, *see, e.g.*, NASD Proposed Rule 2712: IPO Allocations and Distributions (SR-NASD-2003-140), and has promulgated NASD Rule 2790:

Restrictions on the Purchase and Sale of Initial Equity Public Offerings, which sets forth a series of restrictions on the terms of IPO offerings. The availability of an antitrust cause of action regarding the highly regulated market activities at issue in this case would significantly compromise these carefully considered enforcement efforts.

CONCLUSION

Capital formation through a robust, stable, and efficient securities market is essential to this Nation's economy. Congress has fostered a tremendously successful securities system by establishing a comprehensive regulatory framework that, under the expert guidance of the SEC and SROs, has promoted capital formation, protected investors, and prevented fraudulent conduct by market participants. In order to effectuate these congressional objectives, this Court recognized in *Gordon* and *NASD* that the antitrust laws are incompatible with the securities regulatory regime because application of their competition-enhancing principles in the securities setting would proscribe large swaths of marginally anticompetive conduct beneficial to the securities markets and disturb the delicate balance between competition, capital formation, and market stability embodied in the securities laws. Respondents' attempt to superimpose the antitrust laws on the securities regulatory framework would fatally impair this carefully calibrated regulatory system and should therefore be unequivocally rejected by this Court.

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted.

THEODORE B. OLSON
Counsel of Record
F. JOSEPH WARIN
DOUGLAS R. COX
AMIR C. TAYRANI
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500

Counsel for Amicus Curiae

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Supreme Court of the United States

CREDIT SUISSE SECURITIES (USA) LLC, fka
CREDIT SUISSE FIRST BOSTON LLC, *et al.*,

Petitioners,

v.

GLEN BILLING, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MOTION OF NYSE GROUP, INC. FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* IN SUPPORT OF PETITIONERS AND BRIEF *AMICUS CURIAE*

JAY N. FASTOW
Counsel of Record
ELIZABETH M. AVERY
ROBERT S. VELEVIS
WEIL, GOTSHAL & MANGES LLP
767 Fifth Avenue
New York, NY 10153
(212) 310-8000

Counsel for Amicus Curiae

206172

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS CREDIT SUISSE FIRST BOSTON LTD., *ET AL.*

NYSE Group, Inc. (with its subsidiaries, the "NYSE Group") hereby respectfully moves, pursuant to Supreme Court Rule 37.2, for leave to file the attached brief as *amicus curiae* in this case in support of the Petitioners Credit Suisse First Boston Ltd., *et al.* (the "Petitioners"). The consents of counsel for the Petitioners and Respondents Billing, *et al.* have been obtained.[1] The consent of counsel for Respondents Pfeiffer, *et al.*, was requested but not obtained.

The NYSE Group operates two securities exchanges, the New York Stock Exchange LLC ("NYSE") and NYSE Arca, Inc ("NYSE Arca"). The NYSE is the world's largest and most liquid cash equities market, listing operating companies with a total global market capitalization of $25 trillion. NYSE Arca is an all-electronic stock exchange.

NYSE and NYSE Arca are registered with the Securities and Exchange Commission ("SEC") as national securities exchanges and self-regulatory organizations ("SROs") within the meaning of Section 3 of the Securities Exchange Act of 1934 ("Exchange Act"), 15 U.S.C. § 78c(a)(26). The Exchange Act both authorizes and requires SROs to promulgate and enforce rules governing their membership and the conduct of members, member organizations and their employees, 15 U.S.C. §§ 78f(b)(1)-(9), 78s(g), as well as "to remove impediments to and perfect the mechanism of a free and open market . . . and, in general, to protect investors and the public interest." 15 U.S.C. § 78f(b)(5).

1. The written consent is being filed with the Clerk of the Court contemporaneously herewith.

The NYSE Group's performance of its regulatory and general oversight functions are protected by the doctrine of absolute immunity. See, *e.g.*, *D'Alessio* v. *New York Stock Exchange, Inc.*, 258 F.3d 93, 106 (2d Cir. 2001). In addition, with regard to the doctrine of implied immunity, the Court of Appeals stated that "a self-regulatory organization enjoy[s] a special status that [securities market participants] cannot claim." *Billing* v. *Credit Suisse First Boston, Ltd*, 426 F.3d 130, 171 (2d Cir. 2005). Nevertheless, the decision of the Second Circuit is of serious concern to the NYSE Group in a way that reaches well beyond the result of this particular case.

The decision announces a standard for implied antitrust immunity in that industry that is vague and indeterminate, and explicitly disregards the scope of the SEC's authority. As a result, market participants will be unable reasonably to predict whether potential courses of conduct may subject them to antitrust claims for treble damages and joint and several liability. Therefore, market participants are likely to refrain from engaging in collaborative efforts necessary to make the securities industry operate efficiently. See *Verizon Communications Inc.* v. *Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 414 (2004) (expressing concern of over-deterrence if antitrust intervention is allowed in the context of a regulatory regime); *Gordon v. New York Stock Exchange, Inc.*, 422 U.S. 659, 691 (1975) (implied antitrust repeal applies when "necessary to make the Exchange Act work as it was intended. . . .").

The NYSE Group's interest is in the confirmation by the Court of a standard for implied repeal as applied in the securities industry that is reasonably clear to industry participants and thus allows the securities regulatory regime, and securities industry regulators, to function in the manner intended by Congress.

Respectfully submitted,

JAY N. FASTOW
Counsel of Record
ELIZABETH M. AVERY
ROBERT S. VELEVIS
WEIL, GOTSHAL & MANGES LLP
767 Fifth Avenue
New York, NY 10153
(212) 310-8000

Counsel for Amicus Curiae

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NYSE Group, Inc. (with its subsidiaries, the "NYSE Group") respectfully submits this brief as amicus curiae.[1]

INTEREST OF AMICUS CURIAE

The NYSE Group operates two securities exchanges, the New York Stock Exchange LLC ("NYSE") and NYSE Arca, Inc. ("NYSE Arca"), an all-electronic stock exchange. The NYSE is the world's largest and most liquid cash equities market, listing operating companies with a total global market capitalization of $25 trillion. For more than 200 years, this exchange has provided a reliable, orderly, liquid, and efficient marketplace for investors and traders to buy and sell securities.

NYSE and NYSE Arca are registered with the Securities and Exchange Commission ("SEC") as national securities exchanges and self-regulatory organizations ("SROs") within the meaning of Section 3 of the Securities Exchange Act of 1934 ("Exchange Act"), 15 U.S.C. § 78c(a)(26). The Exchange Act both authorizes and requires SROs to promulgate and enforce rules governing their membership and the conduct of members, member organizations and their employees, 15 U.S.C. §§ 78f(b)(1)-(9), 78s(g), as well as "to remove impediments to and perfect the mechanism of a free and open market . . . and, in general, to protect investors and the public interest." 15 U.S.C. § 78f(b)(5).

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1. Petitioners and Respondents Billing, *et al.*, have consented to the NYSE Group, Inc.'s participation as amicus curiae, and letters of consent are filed concurrently with the Clerk of the Court. The consent of Respondents Pfeiffer, *et al.*, has been requested but not obtained. No counsel for any of the parties authored this brief, in whole or in part, and no one other than amicus made a monetary contribution to its preparation or submission.

The NYSE Group's performance of its regulatory and general oversight functions is protected by the doctrine of absolute immunity. See, e.g., *D'Alessio v. N.Y. Stock Exch., Inc.*, 258 F.3d 93, 106 (2d Cir. 2001). In addition, with regard to implied repeal of the antitrust laws, the Court of Appeals stated that "a self-regulatory organization enjoy[s] a special status that [securities market participants] cannot claim." *Billing v. Credit Suisse First Boston, Ltd.*, 426 F.3d 130, 171 (2d Cir. 2005). Nevertheless, the NYSE Group has a vital interest in the Court's articulation of a test for implied antitrust repeal that supports the effective operation of the regulatory scheme adopted by Congress in the Exchange Act and allows participants in the securities markets ("market participants") reasonably to predict whether the antitrust laws will apply to their activities.

SUMMARY OF ARGUMENT

The doctrine of "implied repeal" or "implied immunity" acts to repeal the antitrust laws in certain contexts to allow regulatory schemes to operate as intended by Congress. *United States v. NASD*, 422 U.S. 694, 735 (1975) ("[W]e have implied immunity in particular and discrete instances to ensure that the federal agency entrusted with regulation in the public interest could carry out its responsibility free from the disruption of conflicting judgments that might be voiced by courts exercising jurisdiction under the antitrust laws."). Any analysis of implied repeal thus turns on the structure, history, and goals of the particular regulatory scheme involved. See *Phonetele, Inc. v. Am. Tel. & Tel. Co.*, 664 F.2d 716, 727 (9th Cir. 1981) (Kennedy, J.).

The regulatory regime for the securities industry reflects Congress' understanding that the "security markets ... are

as sensitive as a hair trigger," and affect "the economic machinery of the whole country. . . ." H.R. Rep. No. 73-1383, p. 4 (1934). As a result, the Exchange Act provides the SEC with substantial flexibility and discretion to tailor appropriate solutions to industry issues, and to change its policies as circumstances, and/or its regulatory analysis, evolve. In contrast, the antitrust laws focus solely on competition, not the broad array of factors (including competition) that Congress has mandated the securities regulators to consider, and provide for the blunt remedy of treble damages, rather than the more supple remedial plan of the Exchange Act.

In order to promote the goals of the securities regulatory scheme, collaboration among industry participants can be necessary. Because the antitrust laws often regard collaboration among competitors with suspicion, such conduct is a ripe target for antitrust lawsuits. The potential for such litigation, in turn, can deter such collaborative activity even if it would further the goals of the regulatory regime, and thus conflicts with the operation of the regulatory scheme.

To allow the securities regulatory plan to function as Congress intended, the Court should articulate a standard for implied repeal in this industry that avoids such over-deterrence and (in contrast to the approach of the Court of Appeals) provides industry participants with reasonable clarity by which to assess whether contemplated conduct would be subject to antitrust attack. In particular, that standard should (1) turn on the potential for interference with the workings of the industry regulatory scheme, not actual conflict between the conduct alleged and a particular current regulation, and (2) be sufficiently broad in its application to the field of conduct at issue to protect against dilution of the benefits of the doctrine through efforts at artful pleading.

ARGUMENT

I. Clear Articulation And Application Of The Implied Repeal Doctrine In The Securities Industry Is Necessary To Allow The Industry's Regulatory Scheme To Operate As Congress Intended

A. Implementation of the Doctrine of Implied Repeal Is Specific to the Particular Regulatory Scheme at Issue

The doctrine of implied antitrust repeal is based on concern that a Congressionally-established regulatory scheme can not operate as intended when antitrust courts, with their different standards and remedies, add another layer of oversight to a highly-regulated industry. In particular, the Court has held that the antitrust laws do not apply where "necessary to make the Exchange Act work as it was intended. . . ." *Gordon v. N.Y. Stock Exch., Inc.*, 422 U.S. 659, 691 (1975).

Because the relevant question is the impact of antitrust scrutiny on the functioning of the regulatory system, the application of the implied repeal doctrine is specially tailored to the particular nature of each regulatory scheme. See *Phonetele*, 664 F.2d at 727 ("Each of the Supreme Court's [implied repeal] cases is decisively shaped by considerations of the special aspects of the regulated industry involved."). Indeed, the Court's application of the implied repeal doctrine in the securities industry has varied over time as Congress has amended its securities regulatory scheme. Compare *Silver v. N.Y. Stock Exch.*, 373 U.S. 341, 360 (1963) (finding no implied repeal based on regulatory scheme prior to 1975 amendments to the Exchange Act, which made no provision

for SEC or judicial review of exchange conduct at issue) with *Gordon*, 422 U.S. at 685 (finding implied repeal; decided after the 1975 amendments to the Exchange Act, which, *inter alia*, provided for SEC and judicial review of certain exchange conduct).

B. Congress' Regulatory Scheme for the Securities Industry Reflects the "Hair Trigger" Nature of Securities Markets, and Is Distinguished by Its Structure, Its Flexibility, and the Ongoing Need for Collaboration Among Industry Participants

In crafting its securities regulatory scheme in the wake of the 1929 Wall Street crash and the ensuing Great Depression, S. Rep. No. 73-792, p. 3 (1934), Congress recognized that "security markets . . . are as sensitive as a hair trigger," and affect "the economic machinery of the whole country. . . ." H.R. Rep. No. 73-1383, p. 4 (1934). It thus created for the securities industry "a unique pattern of regulation combining both industry and government responsibility." H.R. Rep. No. 94-123, p. 48 (1975).

One unique aspect of securities regulation is the Exchange Act's tiered approach to regulation, which delegates authority to SROs to act as the front line of enforcing compliance with "legal and ethical standards," with the SEC overseeing the activities of the SROs. See H.R. Rep. No. 94-123, p. 48 (1975). As Justice Douglas stated when he was SEC Chairman, Congress intended to allow the SROs to "take the leadership with Government playing a residual role. Government would keep the shotgun, so to speak, behind the door, loaded, well oiled, cleaned, ready for use but with the hope that it would never have to be used." W. Douglas, Democracy and Finance, 82 (Allen ed. 1940),

quoted in *Silver*, 373 U.S. at 352. The courts serve as an ultimate check in the system, empowered by Congress to review SEC action. See Section 25 of the Exchange Act, 15 U.S.C. § 78y.

The Exchange Act provides substantial flexibility to these regulators when applying their expertise to this sensitive, highly-nuanced, and ever-changing industry. Congress did not design the Exchange Act as a comprehensive list of statutory prohibitions or mandates, but instead granted the SEC sufficient discretion to avoid both "unworkable 'straight-jacket' regulation," on the one hand, and "loopholes which may be penetrated by slight variations in the method of doing business," on the other. S. Rep. No. 73-792, p. 5 (1934). The statute authorizes the SEC "to promulgate rules ... which define permissible conduct of brokers and dealers and establish standards for trading in securities to insure the fairness and orderliness of the securities markets." H.R. Rep. No. 94-123, p. 48 (1975). For example, Section 9(a)(6) of the Exchange Act, 15 U.S.C. § 78i(a)(6), forbids only stabilization of securities prices that is "in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors." See also 15 U.S.C. § 78i(b) (prohibiting options transactions that are in breach of "such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors").

In exercising its authority, the SEC is obliged to consider and weigh both competition and an array of other regulatory factors, such as protection of investors, prevention of fraudulent and manipulative acts and practices, and promotion of just and equitable principles of trade. See, e.g.,

Gordon, 422 U.S. at 689 ("[T]he SEC must consider, in addition [to competition], the economic health of the investors, the exchanges and the securities industry."); Section 19(f) of the Exchange Act, 15 U.S.C. § 78s(f) (addressing "any burden on competition not necessary or appropriate in furtherance of the purposes of this chapter"); see also Section 6(b)(5) of the Exchange Act, 15 U.S.C. § 78f(b)(5) (requiring SROs to adopt rules that are

> designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating . . . and facilitating securities transactions, to remove impediments to and perfect the mechanism of an open market and a national market system, and, in general, to protect investors and the public interest . . .

Section 6(b)(8) of the Exchange Act, 15 U.S.C. § 78f(b)(8) (requiring SRO rules not to impose "any burden on competition not necessary or appropriate in furtherance of the purposes of this chapter").

The SEC evaluates these factors over time, as the industry — and/or the SEC's analysis of the most effective regulatory approach to a matter — change. For example, in contrast to the current situation, in which commission rate-fixing generally is prohibited, commission rates once were, with SEC approval, set by agreement among SROs and brokers. See *Gordon*, 422 U.S. at 662-67. Similarly, although agreements to list equity options on only one exchange are now prohibited, "the SEC [at one time] approved a plan, formulated by the exchanges jointly, for the single, or

exclusive, listing of any new equity option." *In re Stock Exchs. Options Trading Antitrust Litig.*, 317 F.3d 134, 140 (2d Cir. 2003).

The Exchange Act also provides the SEC with a broad and pliant array of measures to enforce its rules and policies, ranging from censure to the permanent bar of a person from acting as an officer or director of an issuer of securities, as well as fines.[2] This substantive and remedial flexibility permits the SEC and SROs to act with precision when crafting solutions to industry issues.

In some cases, such issues may best be addressed through collaboration among industry participants. The Exchange Act thus "enables the [SEC] to require joint activity that otherwise might be asserted to have an impact on competition, where the activity serves the public interest and the interests of investors." SEC Release No. 34-42914, 72 S.E.C. Docket 1493, 2000 WL 816861 (June 13, 2000).[3] See also Section

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2. See 15 U.S.C. § 78o(b)(f) (SEC may censure regulated entities including broker-dealers); 15 U.S.C. § 78u(d)(1) (authorizing the SEC to seek injunctive relief whenever it appears that a person "is engaged or is about to engage in acts or practices [constituting]" a violation of the Exchange Act or regulations promulgated thereto); id. § 78u(d)(3) (permitting the SEC to impose a range of fines for violation of the Exchange Act); id. § 78u(d)(2) (authorizing the court through an SEC enforcement action to "prohibit, conditionally or unconditionally, and permanently or for such period of time as it shall determine, any person who" used or employed any manipulative or deceptive device or contrivance "from acting as an officer or director" of an issuer of securities); 15 U.S.C. § 78u-3 (cease-and-desist proceedings).

3. See also SEC Release No. 34-44177, 74 S.E.C. Docket 1598, 2001 WL 366389 (April 12, 2001) (instituting a joint industry plan for reporting market center information to the public, which resulted from (Cont'd)

6(b)(5) of the Exchange Act, 15 U.S.C. § 78f(b)(5) (requiring the rules of an SRO to foster "coordination and cooperation" between persons engaged in regulating and facilitating securities transactions).

Indeed, the very nature of the regulatory plan embodied in the statute contemplates collaboration among market participants. See Section 6 of the Exchange Act, 15 U.S.C. § 78f (contemplating collaboration among market participants to form national securities exchanges); see also *Silver*, 373 U.S. at 360 ("The entire public policy of self-regulation, beginning with the idea that the Exchange may set up barriers to membership, contemplates that the Exchange will engage in restraints of trade which might well be unreasonable absent sanction by the Securities Exchange Act").

The need for securities industry collaboration remains a strong feature of today's regulatory regime. For instance, the SEC has "support[ed] industry initiatives to improve the operation of the clearance and settlement system," and in particular the development of straight-through processing, which was spearheaded by the Securities Industry Association, an organization comprised of over 600 securities firms. SEC Release No. 33-8398, 82 S.E.C. Docket 1198, 2004 WL 482332 (Mar. 11, 2004). The SEC also permits market participants to issue joint privacy notices to

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(Cont'd)

the SEC's "direct[ing] the [SROs] that trade national market system securities to act jointly in establishing procedures for market centers to follow in making their monthly reports available to the public in a uniform, readily accessible, and usable electronic format").

consumers in order to comply with their notice obligations under the Gramm-Leach-Bliley Act. See SEC Release No. 34-42974, 72 S.E.C. Docket 1694, 2000 WL 797443 (June 22, 2000).

Collaboration by almost 400 broker-dealers and other industry participants was necessary to conduct industry-wide testing to ensure that computer systems would not be adversely affected by the advent of the Year 2000, which the SEC considered an "extremely serious issue." SEC Release No. 34-41661, 70 S.E.C. Docket 455, 1999 WL 548567 (July 27, 1999). Similarly, the NYSE has encouraged its members to participate in industry-wide collaboration in testing their business continuity planning systems. See NYSE Info. Memo No. 05-80, 2005 NYSE Info. Memo LEXIS 80 (Oct. 13, 2005) ("[b]usiness continuity planning decisions made by one institution may affect ... the very functioning of the financial markets.... because of the broad interdependence among industry participants") (citation omitted).

The SEC also found collaboration among SROs to be necessary to implement the conversion of listed securities prices from fractions to decimals. See SEC Release No. 34-42914, 72 S.E.C. Docket 1493, 2000 WL 816861 (June 13, 2000) (requiring SROs "to act jointly in planning, discussing, developing, and submitting to the Commission a plan that will begin phasing in the implementation of decimal pricing in equity securities and options on or before September 5, 2000."). Likewise, collaboration was found necessary for the creation and ongoing viability of the system of options price reporting established through the Options Price Reporting

Authority ("OPRA").[4] Without the SEC's ability to foster such collaboration, these and other important goals of the regulatory scheme may never have been accomplished.

C. The Substantive and Remedial Approaches of the Antitrust Laws Contrast Markedly With Those of the Securities Regulatory Scheme

In contrast to the flexibility that is the hallmark of the Congressional design for the securities regulatory scheme, the antitrust laws are narrowly focused on one goal — competition. See *Gordon*, 422 U.S. at 689 ("The sole aim of antitrust legislation is to protect competition. . . ."). Moreover, antitrust courts by their very nature cannot possess a regulator's intimate familiarity with the issues and needs of the securities industry. And the SEC's ability to select precise corrective measures from a menu of alternatives contrasts sharply with the sledgehammer of requested treble damages awards that are an important feature of antitrust cases. 15 U.S.C. § 15(a).

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4. SEC Release No. 34-51716, 85 S.E.C. Docket 1260, 2005 WL 2043751 (May 19, 2005)

> The OPRA Plan is a national market system plan approved by the Commission pursuant to Section 11A of the Act and Rule 11Aa3-2 thereunder. http://www.opradata.com. The OPRA Plan provides for the collection and dissemination of last sale and quotation information on options that are traded on the participant exchanges. The six participants to the OPRA Plan are the American Stock Exchange LLC, the Boston Stock Exchange, Inc., the Chicago Board Options Exchange, Inc., the International Securities Exchange, Inc., the Pacific Exchange, Inc., and the Philadelphia Stock Exchange, Inc.

Further, the antitrust laws often regard collaboration among competitors with suspicion. See *Nat'l Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679, 695 (1978) (holding per se illegal an agreement among members of professional association to restrict advertising, and observing that the policy underlying the Sherman Act "precludes inquiry into the question whether competition is good or bad"); *United States v. Trenton Potteries Co.*, 273 U.S. 392, 396-401 (1927) (naked price-fixing agreements between competitors are per se unlawful, regardless of whether the price fixed is reasonable). Even when ultimately defensible, such collaboration can become a target of lengthy antitrust litigation, with the potential for expensive, time-consuming discovery, treble damages, joint and several liability with no statutory right of contribution, and the attendant pressure to settle.

As a result, if market participants cannot reasonably gauge whether the implied repeal doctrine will apply in a particular situation, they may well refrain from participating in collaborative conduct, even if such behavior would, in the view of the securities regulators, be beneficial to investors, the industry, and the national economy. Indeed, because of fears of antitrust scrutiny, even certain SROs were reluctant to collaborate to achieve a joint solution to a significant issue in the securities industry (converting prices of exchange listed securities from fractions to decimals) without an order from the SEC explicitly authorizing such collaboration. See SEC Release No. 34-42914, 72 S.E.C. Docket 1493, 2000 WL 816861, n.27 (June 13, 2000) ("The Participants previously requested that, to address concerns about antitrust liability, the Commission order them to work together to coordinate decimal planning.").

Such over-deterrence is plainly repugnant to the operation of the securities regulatory regime. *NASD*, 422 U.S. at 720; cf. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 594 (1986) ("[M]istaken inferences [of impermissible collaboration by an antitrust court] are especially costly, because they chill the very conduct the antitrust laws are designed to protect.") (quoted in *Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 414 (2004) (antitrust repeal applies "to avoid the real possibility of judgments conflicting with the agency's regulatory scheme 'that might be voiced by courts exercising jurisdiction under the antitrust laws'") (quoting *NASD*, 422 U.S. at 734)). Thus, for Congress' securities regulatory scheme to function properly without the intrusive chill of the antitrust laws, there must be a clear standard, and clear implementation of that standard, as to when the antitrust laws apply in this industry.

II. As Implemented In The Securities Industry, The Doctrine Of Implied Repeal Should Turn On The Potential For Conflict With The Operation Of The Regulatory Scheme As Applied To The Field Of Conduct Involved In The Case

A. The Court of Appeals' Approach Conflicts with Prior Decisions of the Court and Provides No Reasonable Guidance to Industry Participants

The Court of Appeals observed that the parties generally agreed that "potential specific conflict" implied repeal applies "to whatever conduct the SEC could permit under its regulatory regime," *Billing*, 426 F.3d at 167, but disagreed as to the application of that standard to this case. Id. The Court of Appeals nevertheless rejected that framework, and

instead propounded an "all the facts and circumstances" balancing test, informed by five criteria, including "any other evidence":

> We will apply immunity if we determine that Congress contemplated the specific conflict and intended for the antitrust laws to be repealed. That determination is informed by considering (1) congressional intent as reflected in legislative history and a statute's structure; (2) the possibility for conflicting mandates; (3) the possibility that application of the antitrust laws would moot a regulatory provision; (4) the history of agency regulation of the anticompetitive conduct; and (5) any other evidence indicating that the statute implies a repeal.

Id. at 164-65. In particular, the Court of Appeals held that it did not need to decide the scope of the SEC's authority over the conduct at issue to determine whether implied repeal applied. Id. at 168 ("We need not resolve the bounds of SEC authority.").

This approach conflicts with the decisions of the Court, which focus on (1) exactly the questions of the existence and exercise of SEC authority that the Court of Appeals eschewed, and (2) the differing standards employed by the antitrust laws (typically limited to competitive effects) and the Exchange Act (considering competition plus other regulatory criteria). In *Silver*, the Court declined to imply repeal because, prior to the 1975 amendments to the Exchange Act, the SEC lacked the authority to review an SRO's termination of a non-member's direct wire connections to members. *Silver*, 373 U.S. at 357-58. The

Court twice noted that "a different case" would exist if such review (including review of competitive implications) were available. Id. at 358 n.12, 360. In *Gordon*, the Court held implied repeal applicable where the SEC had, and had exercised, such power of review with regard to the fixing of commission rates, and imposition of the antitrust laws would "subject the exchanges and their members to conflicting standards." *Gordon*, 422 U.S. at 689-91. The Court reached this conclusion even though, at the time of its decision, the SEC prohibited the fixing of commissions. Id. at 690-91.

The Court of Appeals' decision also conflicts with the Court's decision in *NASD*, by allowing implied repeal on the ground of "pervasive regulation" to apply to market participants only where it would be "derivative" of implied repeal that applied to an SRO. *Billing*, 426 F.3d at 160-61. The Court in *NASD* did not so restrict this ground for implied repeal. There, the government alleged that the NASD and certain mutual funds, underwriters and broker-dealers had agreed to restrict the sale and fix the prices of mutual fund shares, in violation of the Sherman Act. *NASD*, 422 U.S. at 734-35. The Court acknowledged that the conduct at issue was "neither required . . . nor authorized" under the securities laws. Id. at 730. It nevertheless noted the "broad regulatory authority conferred upon the SEC" in the area, id. at 734, and concluded that, in the context ~~of the~~ "pervasive regulatory scheme," implied repeal was applicable to all defendants, without distinguishing between SRO and market participants, because they otherwise could be subject to "duplicative and inconsistent standards" by the concurrent application of the antitrust and the securities laws, which was "hardly a result that Congress would have mandated." Id. at 735.

The defects in the approach of the Court of Appeals are highlighted, not avoided, by its willingness to consider a variety of regulatory factors in assessing the propriety of securities industry conduct under antitrust rule of reason analysis. *Billing*, 426 F.3d at 165-66. By proposing the availability of such a modified rule of reason, the Court of Appeals recognized the inadequacy of the traditional, "competition-only" antitrust analysis in the context of the securities industry. See id. at 165. However, by placing this Exchange Act-like evaluation in the hands of an antitrust court rather than the SEC, the Court of Appeals disregarded an integral part of Congress's regulatory plan recognized by the Court in *NASD* – that the SEC should be making such decisions, not courts. See *NASD*, 422 U.S. at 734 (implied repeal necessary in order to "assure that the federal agency entrusted with regulation in the public interest could carry out that responsibility free from the disruption of conflicting judgments that might be voiced by courts exercising jurisdiction under the antitrust laws.").

Moreover, the Court of Appeal's approach — involving multiple factors, including the vague "any other evidence" criterion, and no structure for analysis —provides no reasonable guidance to market participants, and thus deprives them of any ability reasonably to predict whether potential courses of conduct would subject them to antitrust attack. Particularly given the treble and joint and several nature of antitrust conspiracy damages claims, such uncertainty is likely to cause exactly the over-deterrence and regulatory disruption against which the Court warned recently in *Verizon Communications*, 540 U.S. at 414.

B. Implied Repeal Should Focus on the Potential for Conflict with the Workings of the Regulatory Scheme and Prevent Disruption of that Scheme by Artful Pleading

In contrast, the Court's implied repeal decisions in the securities context outline an approach that affords industry participants the reasonable clarity necessary to support the regulatory scheme. Those decisions reflect the principle that implied repeal applies where the SEC is empowered to regulate, and has been involved in regulating, a field of conduct (e.g., setting of commission rates). Under such circumstances, application of the antitrust laws, with their limited goal (solely of protecting competition), and different means of accomplishing that goal, would create an impermissible potential for conflict with the operation of the Congressionally-enacted regulatory scheme. See *Gordon*, 422 U.S. at 689-90; cf. *Silver*, 373 U.S. at 357-58. See also *Options*, 317 F.3d at 149 (after reviewing *Silver*, *Gordon* and *NASD*, concluding that "the proper focus is . . . on the Commission's authority to permit conduct that the antitrust laws would prohibit.")

This principle does not hinge on the specific approach of the securities regulators at a given time;[5] implied repeal focuses on vindicating the "regulatory system," as devised by Congress, not a particular outcome of that system at a particular moment. *NASD*, 422 U.S. at 720. Thus, in *Gordon*, the Court found implied repeal even though the SEC prohibited the conduct at issue (fixing of commission rates) at the time of the Court's decision. *Gordon*, 422 U.S. at 690-

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5. Contra *Billing*, 426 F.3d at 170 ("The conduct alleged in this case, clearly, is not permitted under SEC regulations.").

91. See also *Options*, 317 F.3d at 142 (finding implied repeal even though, at the time of the decision, the SEC prohibited agreements restricting the listing of equity options to one exchange). This approach is necessary to allow the regulatory system to operate as Congress intended — with the securities regulators re-assessing the impact of conduct under the array of considerations applicable under the Exchange Act as circumstances and/or regulatory analysis change, making distinctions based on the interplay of all those factors (not just competition), and crafting remedial measures with the finely-tuned instrument provided by the Exchange Act, not the cudgel of treble damages.

Finally, to provide the clarity necessary to avoid over-deterrence and vindicate the regulatory scheme, the Court should not only confirm the standard embodied in its earlier decisions, as described supra, it should also implement that standard in a way that covers the full scope of the subject matter at issue (e.g., commission setting, options listing, IPO practices), and not allow the application of implied repeal to turn on fine distinctions between types of alleged behavior within that subject matter, around which distinctions a plaintiff might plead to try to avoid application of the doctrine.

The principle underlying implied repeal — protection against interference with the operation of the regulatory system — does not turn on the nature of the particular alleged behavior challenged within the regulated subject matter; it turns on the Congressional plan for regulation of the subject matter. The purpose of the doctrine would be undermined if plaintiffs could evade it merely by artful pleading.

CONCLUSION

NYSE Group respectfully submits that the Court should reverse the decision of the Court of Appeals, and confirm a standard for implied repeal as applied in the securities industry that is reasonably clear to industry participants and allows the securities regulatory regime to function in the manner intended by Congress.

Respectfully submitted,

JAY N. FASTOW
Counsel of Record
ELIZABETH M. AVERY
ROBERT S. VELEVIS
WEIL, GOTSHAL & MANGES LLP
767 Fifth Avenue
New York, NY 10153
(212) 310-8000

Counsel for Amicus Curiae

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No. 05-1157

IN THE

Supreme Court of the United States

CREDIT SUISSE FIRST BOSTON LTD., *et al.*,

Petitioners,

v.

GLEN BILLING, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE OF NYSE GROUP, INC. IN SUPPORT OF PETITIONERS AND BRIEF AMICUS CURIAE

JAY N. FASTOW
Counsel of Record
ELIZABETH M. AVERY
ANDREW E. BORTECK
WEIL, GOTSHAL & MANGES LLP
767 Fifth Avenue
New York, NY 10153
(212) 310-8000

Counsel for Amicus Curiae

200628

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* IN SUPPORT OF CREDIT SUISSE FIRST BOSTON LTD., *ET AL.*'S PETITION FOR A WRIT OF *CERTIORARI*

NYSE Group, Inc. (with its subsidiaries, the "NYSE Group") hereby respectfully moves, pursuant to Supreme Court Rule 37.2, for leave to file the attached brief as *amicus curiae* in this case in support of the Petition for a writ of *certiorari*. The consent of counsel for Petitioners Credit Suisse First Boston Ltd., *et al.*, has been obtained.[1] The consent of counsel for Respondents Glen Billing, *et al.*, was requested but not obtained.

The NYSE Group operates two securities exchanges, the NYSE and NYSE Arca. The NYSE is the world's largest and most liquid cash equities market, listing over 2,684 companies with a total market capitalization of over $22.5 trillion. NYSE Arca is an all-electronic stock exchange. The NYSE Group also performs regulatory responsibilities relating to these exchanges and their participants.

New York Stock Exchange LLC and NYSE Arca, Inc. are registered with the Securities and Exchange Commission ("SEC") as national securities exchanges and self-regulatory organizations ("SROs") within the meaning of Section 3 of the Securities Exchange Act of 1934 ("Exchange Act"), 15 U.S.C. §78c(a)(26). The Exchange Act both authorizes and requires SROs to promulgate and enforce rules governing their membership and the conduct of members, member organizations and their employees, 15 U.S.C. §§78f(b)(1)-(9), 78s(g), as well as "to remove impediments to and perfect the mechanism of a free and open market . . . and, in general,

1. The written consent is being filed with the Clerk of the Court contemporaneously herewith.

to protect investors and the public interest." 15 U.S.C. §78f(b)(5).

The NYSE Group's performance of its regulatory and general oversight functions are protected by the doctrine of absolute immunity. See, *e.g.*, *D'Alessio* v. *New York Stock Exchange, Inc.*, 258 F.3d 93, 106 (CA2 2001) ("[W]hen acting in its capacity as a SRO, [the NYSE Group] is entitled to immunity from suit when it engages in conduct consistent with the quasi-governmental powers delegated to it pursuant to the Exchange Act and the regulations and rules promulgated thereunder."). In addition, with regard to the doctrine of implied immunity, the Court of Appeals stated that "a self-regulatory organization enjoy[s] a special status that [securities market participants] cannot claim." *Billing* v. *Credit Suisse First Boston, Ltd*, 426 F.3d 130, 171 (CA2 2005). Nevertheless, the decision of the Second Circuit is of serious concern to the NYSE Group in a way that reaches well beyond the result of this particular case.

In the Circuit that is home to much of the nation's securities industry, the decision announces a standard for implied antitrust immunity in that industry that is vague and indeterminate, and explicitly disregards the scope of the SEC's authority. As a result, market participants will be unable reasonably to predict whether potential courses of conduct may subject them to antitrust claims for treble damages and joint and several liability, and therefore are likely to refrain from engaging in collaborative efforts necessary to make the securities industry operate efficiently. See *Verizon Communications Inc.* v. *Law Offices of Curtis v. Trinko, LLP*, 540 U.S. 398, 414 (2004) (expressing concern of over-deterrence if antitrust intervention is allowed in the context of a regulatory regime); *Silver* v. *New York Stock Exchange*, 373 U.S. 341, 357 (1963) (antitrust immunity is proper where necessary "to make the [Exchange Act] work").

The NYSE Group's interest is in the immediate articulation by the Court of a clear implied immunity standard that supports the authority of securities industry regulators and allows Congress' regulatory scheme to work as intended. Accordingly, NYSE Group, Inc. respectfully moves the Court to grant it leave to file the attached brief as *amicus curiae* in support of the Petition for a writ of *certiorari* to the Second Circuit.

Respectfully submitted,

JAY N. FASTOW
Counsel of Record
ELIZABETH M. AVERY
ANDREW E. BORTECK
WEIL, GOTSHAL & MANGES LLP
767 Fifth Avenue
New York, NY 10153
(212) 310-8000

Counsel for Amicus Curiae

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NYSE Group, Inc. (with its subsidiaries, the "NYSE Group") respectfully submits this brief as *amicus curiae* in support of the Petition for a writ of *certiorari*.[1]

INTEREST OF AMICUS CURIAE

The NYSE Group operates two securities exchanges, the NYSE and NYSE Arca (an all-electronic stock exchange). The NYSE is the world's largest and most liquid cash equities market, listing over 2,684 companies with a total market capitalization of over $22.5 trillion. For over 200 years, this exchange has provided a reliable, orderly, liquid, and efficient marketplace for investors and traders to buy and sell listed securities. The NYSE Group also performs regulatory responsibilities relating to these exchanges and their participants.

The New York Stock Exchange LLC and NYSE Arca, Inc. are registered with the Securities and Exchange Commission ("SEC") as national securities exchanges and self-regulatory organizations ("SROs") within the meaning of Section 3 of the Securities Exchange Act of 1934 ("Exchange Act"), 15 U.S.C. §78c(a)(26). The Exchange Act both authorizes and requires SROs to promulgate and enforce rules governing their membership and the conduct of members, member organizations and their employees, 15 U.S.C. §§78f(b)(1)-(9), 78s(g), as well as "to remove impediments to and perfect the mechanism of a free and open

1. Petitioners have consented to NYSE Group, Inc.'s participation as *amicus curiae*, and a letter of consent is being filed concurrently with the Clerk of the Court. The consent of Respondents has been requested but not obtained. No counsel for any of the parties authored this brief, in whole or in part, and no one other than *amicus* made a monetary contribution to its preparation or submission.

market . . . and, in general, to protect investors and the public interest." 15 U.S.C. §78f(b)(5).

The NYSE Group's performance of its regulatory and general oversight functions is protected by the doctrine of absolute immunity. See, *e.g.*, *D'Alessio* v. *New York Stock Exchange, Inc.*, 258 F.3d 93, 106 (CA2 2001) ("[W]hen acting in its capacity as a SRO, [the NYSE Group] is entitled to immunity from suit when it engages in conduct consistent with the quasi-governmental powers delegated to it pursuant to the Exchange Act and the regulations and rules promulgated thereunder."). In addition, with regard to implied immunity, the Court of Appeals stated that "a self-regulatory organization enjoy[s] a special status that [securities market participants] cannot claim." *Billing* v. *Credit Suisse First Boston, Ltd.*, 426 F.3d 130, 171 (CA2 2005). Despite this special status, the NYSE Group has a vital interest in the immediate articulation by the Court of a test for implied antitrust immunity in this industry that allows participants in the securities markets ("market participants") reasonably to predict whether the antitrust laws will apply to particular activities, and supports the Exchange Act regulatory scheme.

SUMMARY OF ARGUMENT

Amicus curiae NYSE Group, Inc. respectfully submits that the Court should give its immediate attention to stating the proper standard for implied immunity[2] from the antitrust laws in the context of the federal regulatory scheme that governs the securities industry.

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2. "Implied immunity" is also known as "implied repeal" or "implied revocation." *See Friedman* v. *Solomon/Smith Barney, Inc.*, 313 F.3d 796, 799 (CA2 2002).

First, if let stand, the Court of Appeals' decision would impair the efficient operation of the nation's securities industry. The indeterminate balancing test announced by the Second Circuit, *Billing*, 426 F.3d, at 164-165, deprives market participants of the ability reasonably to predict whether the antitrust laws will apply to potential courses of conduct. Given the potential for treble damages and joint and several liability in antitrust conspiracy cases involving billions of dollars of commerce, the resulting uncertainty is likely to cause market participants to refrain from engaging in collaborative efforts necessary to make the regulatory system work as intended by Congress, and thus to make the industry operate most efficiently. Because the securities industry is so central to the health of the overall economy yet is "as sensitive as a hair trigger," H.R. Rep. No. 73-1383, p. 4 (1934), and because the Second Circuit decision would, as a practical matter, affect the conduct of market participants nationwide, the Court should intervene now to articulate the proper standard for implying antitrust immunity in this industry.

Second, the Second Circuit's approach to determining the existence of implied antitrust immunity conflicts with the precedents of the Court.

a. Under the approach of the Court of Appeals, whether immunity will be implied under the "specific potential conflict" branch of the doctrine turns on an undefined balancing of an unlimited array of factors, without regard to whether the SEC has the authority to regulate, and has actively regulated, the conduct at issue. In contrast, to allow the federal scheme of securities regulation to operate as Congress intended, the Court has held the antitrust laws inapplicable to conduct the SEC has actively regulated.

See *Gordon* v. *New York Stock Exchange, Inc.*, 422 U.S. 659, 689-690 (1975) (implying immunity as to antitrust claims alleging the fixing of commission rates where the SEC had the authority to address, and had addressed, such conduct, even though, at the time of the decision, it prohibited such behavior); cf. *Silver* v. *New York Stock Exchange*, 373 U.S. 341, 357-358 (1963) (finding no implied immunity because the SEC lacked the authority to review the SRO action at issue).

In trying to minimize the impact of its decision, the Court of Appeals concedes that conduct in the securities industry cannot be judged under the typical antitrust paradigm, and suggests that antitrust analysis in this industry may take account of regulatory considerations other than competition. *Billing*, 426 F.3d, at 165-166. While it thus acknowledges the applicability of the broader, Exchange Act balancing (which weighs an array of regulatory factors in addition to competition), the Court of Appeals' approach contravenes Congressional intent — as recognized in the decisions of the Court — that such evaluation be performed by the SEC, with its industry experience and expertise, and without interference from the possibility that an antitrust court will reach a conflicting judgment. See *United States* v. *Nat'l Assn. of Securities Dealers, Inc.*, 422 U.S. 694, 735 (1975) ("[W]e have implied immunity in particular and discrete instances to ensure that the federal agency entrusted with regulation in the public interest could carry out its responsibility free from the disruption of conflicting judgments that might be voiced by courts exercising jurisdiction under the antitrust laws.").

b. The decision below also conflicts with precedent of the Court with respect to the availability of the "pervasive

regulation" basis for implied immunity. While the Court of Appeals would allow market participants such immunity only where somehow "derivative" of implied immunity found to exist with respect to an SRO, the Court in *National Association of Securities Dealers* provided a much broader basis, making this doctrine available when necessary to protect defendants — whether regulator or regulated — from being "subjected to duplicative and inconsistent standards." *Ibid.*

ARGUMENT

I. Articulation by the Court of a Standard for Implying Antitrust Immunity in the Securities Industry That Is Clear to Market Participants and Supports Congress' Regulatory Scheme Is a Matter of Immediate National Importance

A. The Exchange Act Embodies a Unique Scheme Designed to Regulate an Industry That Is Both "Sensitive as a Hair Trigger" and Central to the Nation's Economy

"[E]ach of the Supreme Court's [implied immunity] cases is decisively shaped by considerations of the special aspects of the regulated industry involved." *Phonetele, Inc.* v. *Am. Tel. & Tel. Co.*, 664 F.2d 716, 727 (CA9 1981) (Kennedy, J.). For the securities industry, Congress created "a unique pattern of regulation combining both industry and government responsibility." H.R. Rep. No. 94-123, p. 48 (1975). It adopted this regulatory structure in the early 1930s, in the wake of the 1929 Wall Street crash and the ensuing Great Depression, S. Rep. No. 73-792, p. 3 (1934), and in recognition that "security markets . . . are as sensitive as a

hair trigger," and affect "the economic machinery of the whole country. . . ." H.R. Rep. No. 73-1383, p. 4 (1934).

A unique aspect of the Exchange Act is its tiered approach to regulation, which delegates authority to SROs to act as the front line of enforcing compliance with "legal and ethical standards," with the SEC overseeing the activities of the SROs. *See* H.R. Rep. No. 94-123, p. 48 (1975). As Justice Douglas stated when he was SEC Chairman, Congress intended to allow the SROs to "take the leadership with Government playing a residual role. Government would keep the shotgun, so to speak, behind the door, loaded, well oiled, cleaned, ready for use but with the hope that it would never have to be used." W. Douglas, Democracy and Finance, 82 (Allen ed. 1940), quoted in *Silver*, 373 U.S., at 352.

Another hallmark of the Exchange Act is the flexibility it provides regulators to apply their expertise to this sensitive, highly-nuanced and ever-changing industry. Congress did not design the Exchange Act as a comprehensive list of statutory prohibitions or mandates, but instead granted the SEC regulatory discretion sufficient to avoid both "unworkable 'straight-jacket' regulation," on the one hand, and "loopholes which may be penetrated by slight variations in the method of doing business," on the other. S. Rep. No. 73-792, p. 5 (1934). The statute authorizes the SEC "to promulgate rules . . . which define permissible conduct of brokers and dealers and establish standards for trading in securities to insure the fairness and orderliness of the securities markets." H.R. Rep. No. 94-123, p. 48 (1975). For example, Section 9(a)(6) of the Exchange Act, 15 U.S.C. §78i(a)(6), forbids only stabilization of securities prices that is "in contravention of such rules and regulations as the Commission may prescribe

as necessary or appropriate in the public interest or for the protection of investors." See also 15 U.S.C. §78i(b) (prohibiting options transactions that are in breach of "such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors").

In exercising its authority, the SEC is obliged to consider and weigh both competition and an array of other regulatory factors, such as protection of investors, prevention of fraudulent and manipulative acts and practices, and promotion of just and equitable principles of trade. See, *e.g.*, Section 19(f) of the Exchange Act, 15 U.S.C. §78s(f) (addressing "any burden on competition not necessary or appropriate in furtherance of the purposes of this chapter"); Section 6(b)(5) of the Exchange Act, 15 U.S.C. §78f(b)(5) (requiring SROs to adopt rules that take account of these regulatory factors). In an ongoing, evolutionary process, the SEC evaluates those factors over time, as the industry and the SEC's analysis of the needs of the industry and its participants develop.[3] The antitrust laws, in contrast, provide a narrower framework and less flexibility, typically focusing on competition exclusively. See *Gordon*, 422 U.S., at 689 ("The sole aim of antitrust legislation is to protect competition. . . .").

3. See *Gordon*, 422 U.S., at 666, 675 (1975) (SEC once allowed SROs to fix "reasonable" commission rates, but at the time of the decision prohibited collective rate setting); *In re Stock Exchanges Options Trading Antitrust Litig.*, 317 F.3d 134, 139 (CA2 2003) (SEC had previously approved options allocation plan, but at the time of the lawsuit prohibited agreements for exclusive listing of options).

In addition, the antitrust laws often regard collaboration among competitors with suspicion.[4] Even though permissible in particular circumstances, such collaboration can become a target of lengthy antitrust litigation, with the potential for treble damages and joint and several liability with no statutory right of contribution,[5] and the attendant pressure to settle. However, in the securities industry, the very essence of which is the creation and maintenance of a marketplace where buyers and sellers interact, such collaboration among participants is essential, as acknowledged by the industry's self-regulatory structure. Section 6 of the Exchange Act, 15 U.S.C. §78f (contemplating collaboration among market participants to form national securities exchanges).[6] Moreover, to perform their roles effectively under the Exchange Act, SROs and the SEC may engage in conduct

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4. See, *e.g.*, *United States* v. *General Motors Corp.*, 384 U.S. 127, 143 (1966) (holding §1 of the Sherman Act violated where "joint and collaborative action was pervasive in the initiation, execution, and fulfillment of the plan" among competitors to refuse to deal with certain types of distributors); *United States* v. *Container Corp. of America*, 393 U.S. 333, 337 (1969) ("The inferences are irresistible that the exchange of price information [among competitors] has had an anticompetitive effect in the industry, chilling the vigor of price competition.").

5. See 15 U.S.C. §15(a) (providing for treble damages in federal antitrust cases); *Texas Industries, Inc.* v. *Radcliff Materials, Inc.*, 451 U.S. 630, 640, 645 (1981) (stating that joint and several liability under the Sherman Act "simply ensures that the plaintiffs will be able to recover the full amount of damages from some, if not all, participants" and that "Congress neither expressly nor implicitly intended to create a right to contribution.").

6. See also Section 11A of the Exchange Act, 15 U.S.C. §78k-1; Section 15A of the Exchange Act, 15 U.S.C. §78o-3.

involving multiple market participants. For example, at one time commission rates were, with SEC approval, set by agreement among SROs and brokers. See *Gordon*, 422 U.S., at 662-667. Similarly, "the SEC [at one time] approved a plan, formulated by the exchanges jointly, for the single, or exclusive, listing of any new equity option." *Options*, 317 F.3d, at 140 (citing SEC Release No. 16863, 1980 SEC LEXIS 1378, at *1-*2 (May 30, 1980)); see also *Silver*, 373 U.S., at 360 ("The entire public policy of self-regulation, beginning with the idea that the Exchange may set up barriers to membership, contemplates that the Exchange will engage in restraints of trade which might well be unreasonable absent sanction by the Securities Exchange Act").

Securities industry collaboration continues today.[7] In the absence of a clear standard for implying antitrust immunity, however, the prospect of antitrust attack could deter necessary and beneficial conduct of this sort.

B. By Creating Unreasonable Uncertainty and Disregarding the Authority of the SEC, the Second Circuit's Vague Balancing Test Would Impair the Effectiveness of the Federal Scheme of Securities Regulation on a Nationwide Basis

The parties to this case generally agreed that "potential specific conflict" antitrust immunity applies "to whatever

7. See, *e.g.*, NYSE Info. Memo No. 05-80, 2005 NYSE Info. Memo LEXIS 80 (Oct. 13, 2005) (providing guidance on business continuity and contingency plans, and noting that "[b]usiness continuity planning decisions made by one institution may affect the safety and soundness of other institutions and, possibly, the very functioning of the financial markets . . . . because of the broad interdependence among industry participants") (citation omitted).

conduct the SEC could permit under its regulatory regime," *Billing*, 426 F.3d, at 167-169, but disagreed as to the application of that standard to this case. *Ibid.* In stark contrast, the Second Circuit held that it did not need to decide the scope of the SEC's authority over the conduct at issue to determine whether antitrust immunity applied. *Id.*, at 168 ("We need not resolve the bounds of SEC authority."). Instead, it propounded an "all the facts and circumstances" balancing test, informed by five criteria, including "any other evidence":

> "We will apply immunity if we determine that Congress contemplated the specific conflict and intended for the antitrust laws to be repealed. That determination is informed by considering (1) congressional intent as reflected in legislative history and a statute's structure; (2) the possibility for conflicting mandates; (3) the possibility that application of the antitrust laws would moot a regulatory provision; (4) the history of agency regulation of the anticompetitive conduct; and (5) any other evidence indicating that the statute implies a repeal." *Id.*, at 164-165.

This standard deprives market participants of any ability reasonably to predict whether potential courses of conduct would subject them to antitrust scrutiny. Particularly given the trebling and joint and several nature of antitrust conspiracy damages, such uncertainty is likely to cause exactly the over-deterrence and regulatory disruption against which the Court warned in *Verizon Communications Inc.* v. *Law Offices of Curtis v. Trinko, LLP*, 540 U.S. 398, 414 (2004) ("Mistaken inferences and the resulting false condemnations [by an antitrust court intervening where a

regulatory regime is in place] 'are especially costly, because they chill the very conduct the antitrust laws are designed to protect.'") (quoting *Matsushita Elec. Indus. Co.* v. *Zenith Radio Corp.*, 475 U.S. 574, 594 (1986)).

In particular, in an industry requiring collaboration among competitors, the lack of a clear standard for implied antitrust immunity is likely to deter market participants from engaging in beneficial collaborative efforts that support regulatory initiatives and make the industry more efficient. Moreover, because New York, and thus the Second Circuit, is home to much of the nation's securities industry, the Second Circuit's decision would, as a practical matter, detrimentally affect the conduct of securities market participants nationwide. Immediate clarification is warranted, especially since the issue (the applicable legal standard) is so starkly presented, the opportunities for review by the Court may be infrequent, and the stakes for the economy are so high. See *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Dabit*, __ S. Ct. __, 2006 U.S. LEXIS 2497, **13 (March 21, 2006) ("[t]he magnitude of the federal interest in protecting the integrity and efficient operation of the market for nationally traded securities cannot be overstated.").

II. The Second Circuit's Approach Conflicts with the Court's Decisions, Which Promote the Integrity of the Congressionally-Mandated Securities Scheme

A. The Second Circuit's Test For a "Potential Specific Conflict" Is Contrary to the Court's Decisions in *Gordon*, *Silver* and *National Association of Securities Dealers*

The need for immediate review of this issue is magnified by the direct conflict between the Court of Appeals' approach and the Court's precedents. The Second Circuit held it did not need to decide the scope of SEC authority over the conduct at issue to determine whether the antitrust laws were impliedly repealed by the securities laws. *Billing*, 426 F.3d, at 168. In contrast, the Court's decisions focus on the questions of the existence and exercise of SEC authority that the Court of Appeals eschewed and the differing standards employed by the antitrust laws (typically limited to competitive effects) and the Exchange Act (considering competition plus other regulatory criteria).

In *Silver*, the Court declined to imply immunity because, prior to the 1975 amendments to the Exchange Act, the SEC lacked the authority to review the termination of a non-member's direct wire connections to members. *Silver*, 373 U.S., at 357-358. The Court twice noted that "a different case" would exist if such review (including review of competitive implications) were available. *Id.*, at 358 n.12, 360.[8] In *Gordon*, the Court held implied repeal

8. The 1975 Amendments to the Exchange Act conferred on the SEC extensive powers to review exchanges' conduct and the application of their rules, 15 U.S.C. §78s(d), and specifically included competition as one of the factors for the SEC to consider. 15 U.S.C. §78s(f).

appropriate where the SEC had, and had exercised, such power of review with regard to the fixing of commission rates, and imposition of the antitrust laws would "subject the exchanges and their members to conflicting standards." *Gordon*, 422 U.S., at 689-691. The Court reached this conclusion despite the fact that the SEC prohibited such conduct at the time of the Court's decision. *Id.*, at 690-91.

This conflict is not avoided by the Second Circuit's expression of willingness to consider a variety of regulatory factors in assessing the propriety of securities industry conduct under the antitrust laws. *Billing*, 426 F.3d, at 165-166. By proposing the availability of such a modified rule of reason analysis, the Court of Appeals recognized the inadequacy of the traditional, "competition-only" analysis typically applied under the antitrust laws in the context of the securities industry. *See id.*, at 165. However, the court disregarded an integral part of Congress's regulatory plan, by placing this Exchange Act-like evaluation in the hands of an antitrust court rather than the SROs and the SEC. The ability of SROs and the SEC to develop finely calibrated regulatory responses for this rapidly-changing industry would be impaired if the potential for massive antitrust judgments chilled the collaboration these expert regulators consider desirable. See *Nat'l Assn. of Securities Dealers, Inc.*, 422 U.S., at 734 (implied immunity necessary in order to "assure that the federal agency entrusted with regulation in the public interest could carry out that responsibility free from the disruption of conflicting judgments that might be voiced by courts exercising jurisdiction under the antitrust laws.").

B. The Second Circuit's Approach to the "Pervasive Regulation" Branch of Implied Immunity Conflicts with the Court's Decision in *National Association of Securities Dealers*

The Second Circuit's decision also conflicts with *National Association of Securities Dealers*, by allowing implied immunity on the ground of "pervasive regulation" to apply to market participants only where it would be somehow be "derivative" of immunity that applied to an SRO. *Billing*, 426 F.3d, at 160-161. The Court in *National Association of Securities Dealers* did not so restrict this ground for implied immunity. There, the government alleged that the National Association of Securities Dealers and certain mutual funds, underwriters and broker-dealers had agreed to restrict the sale and fix the prices of mutual fund shares, in violation of the Sherman Act. *Nat'l Assn. of Securities Dealers, Inc.*, 422 U.S., at 734-735. The Court acknowledged that conduct at issue was "neither required . . . nor authorized" under the securities laws. *Id.*, at 730. It nevertheless noted the "broad regulatory authority conferred upon the SEC" in the area, *id.*, at 734, and concluded that, in the context of the "pervasive regulatory scheme," implied repeal was applicable to all defendants, without distinguishing between SRO and market participants, because they otherwise could be subject to "duplicative and inconsistent standards" by the concurrent application of the antitrust and the securities laws, which was "hardly a result that Congress would have mandated." *Id.*, at 735.

The Second Circuit's decision conflicts with this standard — a conflict it cannot avoid by incorporating other regulatory factors, together with competition, into an antitrust analysis, but diverting their consideration away from the

industry regulators intended by Congress to apply and balance all of these factors.

CONCLUSION

NYSE Group, Inc. respectfully submits that the Court should grant the Petition for a writ of *certiorari*.

Respectfully submitted,

JAY N. FASTOW
Counsel of Record
ELIZABETH M. AVERY
ANDREW E. BORTECK
WEIL, GOTSHAL & MANGES LLP
767 Fifth Avenue
New York, NY 10153
(212) 310-8000

Counsel for Amicus Curiae

MOTION FILED

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In the Supreme Court of the United States

CREDIT SUISSE SECURITIES (USA) LLC, ET AL.,

Petitioners,

v.

GLEN BILLING, ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

MOTION FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE* AND BRIEF OF THE SECURITIES INDUSTRY AND FINANCIAL MARKETS ASSOCIATION, THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, AND THE BUSINESS ROUNDTABLE AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

ROY T. ENGLERT, JR.*
GARY A. ORSECK
DANIEL R. WALFISH
Robbins, Russell, Englert, Orseck & Untereiner LLP
1801 K Street, N.W. Suite 411
Washington, D.C. 20006
(202) 775-4500

ROBIN S. CONRAD
AMAR D. SARWAL
National Chamber Litigation Center, Inc.
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337

ROBERT H. BORK
6520 Ridge Street
McLean, VA 22101
(703) 288-1174

MARJORIE E. GROSS
Securities Industry and Financial Markets Association
360 Madison Avenue
New York, NY 10017
(646) 637-9204

MARIA GHAZAL
Business Roundtable
1717 Rhode Island Avenue, N.W.
Suite 800
Washington, D.C. 20036
(202) 872-1260

* *Counsel of Record*

MOTION FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE*

Under Rule 37.2 of the Rules of this Court, the Securities Industry and Financial Markets Association (SIFMA), the Chamber of Commerce of the United States of America (Chamber), and the Business Roundtable move for leave to file the accompanying brief as *amici curiae* in support of petitioners. Counsel for petitioners has consented to the filing of this brief, but counsel for respondents have not consented.

SIFMA is a trade association that results from the November 1, 2006, merger of the Securities Industry Association and The Bond Market Association. It brings together the shared interests of more than 650 securities firms, banks, and asset managers. SIFMA's mission is to promote policies and practices that expand and improve markets, foster the development of new products and services, and create efficiencies for member firms, while preserving and enhancing the public's trust and confidence in the markets and the industry. SIFMA works to represent its members' interests in the United States and globally. It has offices in New York, Washington, D.C., and London.

The Chamber is the world's largest business federation. The Chamber's underlying membership includes more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of vital concern to the nation's business community.

The Business Roundtable (Roundtable) is an association of chief executive officers (CEOs) of leading U.S. companies with $4.5 trillion in annual revenues and more than 10 million employees. Member companies comprise nearly a third of the

total value of the U.S. stock markets and represent over 40 percent of all corporate income taxes paid. Collectively, they returned $112 billion in dividends to shareholders and the economy in 2005. The Roundtable is committed to advocating public policies that ensure vigorous economic growth, a dynamic global economy, and the well-trained and productive U.S. workforce essential for future competitiveness. The Roundtable's effectiveness is based on the fact that it draws on CEOs directly and personally, and presents government with reasoned alternatives and productive suggestions.

Amici have a strong interest in this case and are well situated to brief the Court on its implications. If the decision below is affirmed, the prospect of antitrust attacks will deter the financial industry from beneficial practices in connection with initial public offerings (IPOs) and other underwritten securities offerings that promote the formation of capital. The likely effects include an increase in the cost of capital for companies offering shares to the public, and damage to the competitiveness of the United States' capital markets.

Amici therefore propose to give the Court guidance on matters that are especially within their expertise. *Amici* seek to demonstrate that the IPO process is pervasively regulated under a regime that balances in a nuanced way the promotion of competition against other policy objectives. *Amici* also are well positioned to advise the Court on the real-world consequences for their members—and ultimately the capital-raising process—of an affirmance. *Amicus* SIFMA brings the perspective of the financial industry, which would have to order its conduct in response to the threat of antitrust liability. And *amici* Chamber and the Roundtable bring the perspective of *issuers* of securities, including corporations going public—a constituency that has a great deal at stake in this case but is otherwise unrepresented in it.

For the foregoing reasons, SIFMA, the Chamber, and the Business Roundtable should be granted leave to file the attached brief.

Respectfully submitted.

ROY T. ENGLERT, JR.*
GARY A. ORSECK
DANIEL R. WALFISH
Robbins, Russell, Englert, Orseck & Untereiner LLP
1801 K Street, N.W. Suite 411
Washington, D.C. 20006
(202) 775-4500

ROBIN S. CONRAD
AMAR D. SARWAL
National Chamber Litigation Center, Inc.
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337

ROBERT H. BORK
6520 Ridge Street
McLean, VA 22101
(703) 288-1174

MARJORIE E. GROSS
Securities Industry and Financial Markets Association
360 Madison Avenue
New York, NY 10017
(646) 637-9204

MARIA GHAZAL
The Business Roundtable
1717 Rhode Island Avenue, N.W.
Suite 800
Washington, D.C. 20036
(202) 872-1260

* *Counsel of Record*

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Cases:

Brown v. *Pro Football, Inc.*,
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Buckman Co. v. *Plaintiffs' Legal Committee*,
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Coopers & Lybrand v. *Livesay*,
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Dep't of Enforcement v. *Invemed Assocs.*,
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Friedman v. *Salomon/Smith Barney, Inc.*,
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Gordon v. *New York Stock Exchange, Inc.*,
422 U.S. 659 (1975) 11

Hughes Tool Co. v. *Trans World Airlines, Inc.*,
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In re NASD, Inc.,
19 S.E.C. 424 (1945) 4, 9

In re NASD, Inc.,
9 S.E.C. 38 (1941) 4

Keogh v. *Chicago & N.W. Ry. Co.*,
260 U.S. 156 (1922) 16

TABLE OF AUTHORITIES—Continued

Page(s)

Merrill Lynch, Pierce, Fenner & Smith, Inc. v. *Dabit*,
126 S. Ct. 1503 (2006) 28

Nat'l Soc'y of Prof'l Eng'rs v. *United States*,
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Schaefer v. *First Nat'l Bank of Lincolnwood*,
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Standard Oil Co. of New Jersey v. *United States*,
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Texas Indus., Inc. v. *Radcliff Materials, Inc.*,
451 U.S. 630 (1981) 18

U.S. Navigation Co. v. *Cunard S.S. Co.*,
284 U.S. 474 (1932) 16

United States v. *L. Cohen Grocery Co.*,
255 U.S. 81 (1921) 21

United States v. *Nat'l Ass'n of Sec. Dealers, Inc.*,
422 U.S. 694 (1975) ..... passim

Verizon Commc'ns Inc. v. *Law Offices of Curtis V. Trinko, LLP*,
540 U.S. 398 (2004) 1, 2, 11, 12, 17

Statutes, Regulations, and Rules:

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TABLE OF AUTHORITIES—Continued

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15 U.S.C. § 78o-3 ..... 4, 6, 13

15 U.S.C. § 80a-22 13

17 C.F.R. § 229.508 7

17 C.F.R. § 230.461 7

17 C.F.R. § 240.17a-2 9

17 C.F.R. § 242.104 9

NASD Rule 2710: Corporate Financing Rule—
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NASD Rule 2740: Selling Concessions,
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National Securities Markets Improvement Act of 1996
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codified at 15 U.S.C. §§ 77b(b), 78c(f), 80a-2 .... 4, 28

Private Securities Litigation Reform Act of 1995,
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15 U.S.C. § 78u-4(b) 23, 28

Regulation M, 17 C.F.R. §§ 242.100 – .105 (2005) 10

Securities Acts Amendments of 1975,
Pub. L. No. 94-29, 89 Stat. 97 4

TABLE OF AUTHORITIES—Continued

Page(s)

Miscellaneous:

Amendments to Regulation M: Anti-Manipulation Rules Concerning Securities Offerings, SEC Release No. 34-50831, 69 Fed. Reg. 75774 (Dec. 17, 2004) 8, 22, 23

1A PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW (3d ed. 2006) 16, 17

Paul Atkins, *A Serious Threat to Our Capital Markets*, WALL. ST. J., June 10, 2006, at A12 27

Certain Short Selling of Securities and Securities Offerings, SEC Release No. 34-10636, 39 Fed. Reg. 7806 (Feb. 11, 1974) 8

COMM. ON CAPITAL MARKETS REGULATION, INTERIM REPORT (Nov. 30, 2006), *available at* http://www.capmktsreg.org/research.html 26, 27, 28

Commission Guidance Regarding Prohibited Conduct in Connection with IPO Allocations, SEC Release No. 33-8565, 70 Fed. Reg. 19672 (Apr. 13, 2005) 10, 24

Frank H. Easterbrook, *The Limits of Antitrust*, 63 TEX. L. REV. 1 (1984) 20

FEDERAL TRADE COMMISSION & U.S. DEP'T OF JUSTICE, ANTITRUST GUIDELINES FOR COLLABORATIONS AMONG COMPETITORS (2000), *available at* http://www.ftc.gov/os/2000/04/ftcdojguidelines.pdf 20

TABLE OF AUTHORITIES—Continued

Page(s)

H.R. Rep. No. 73-1383 (1934) 4

Herbert Hovenkamp, *Antitrust Violations in Securities Markets*, 28 J. CORP. L. 607 (2003) 5

Institutional Investor Study Report of the SEC, H.R. Doc. No. 92-64, Pt. 5 (1971) 26

Craig Karmin & Aaron Lucchetti, *New York Loses Edge in Snagging Foreign Listings*, WALL ST. J., Jan. 26, 2006, at C1 28

Letter from Gary L. Goldsholle to Dana Fleischman (Nov. 24, 2003), *available at* http://tinyurl.com/yhocak 5, 7

Notice of Filing of Proposed Rule Changes, SEC Release No. 34-50896, 69 Fed. Reg. 77804 (Dec. 28, 2004) 8, 9

Order Approving Proposed Rule Change, SEC Release No. 34-17371, 45 Fed. Reg. 83707 (Dec. 19, 1980) 5

REPORT OF THE SEC CONCERNING THE HOT ISSUES MARKETS (Aug. 1984) 7

Reports on Stabilizing Activities, SEC Release No. 34-9605, 37 Fed. Reg. 10960 (May 24, 1972) 9

S. Rep. No. 73-792 (1934) 4

TABLE OF AUTHORITIES—Continued

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SEC Release No. 33-4358, 1961 WL 61584 (Apr. 24, 1961) 8

SEC, Reports on Stabilizing Activities, 21 Fed. Reg. 501 (Jan. 13, 1956) 9

SECURITIES INDUSTRY ASSOCIATION, CAPITAL MARKETS HANDBOOK (John C. Burch, Jr. & Bruce S. Foerster eds., 6th ed. 2007) 9

SECURITIES INDUSTRY FACT BOOK 2002 (2002), *available at* http://www.sia.com/research/pdf/2002Fact_Book.pdf 25

Chester S. Spatt, *Financial Regulation: Economic Margins and "Unintended Consequences"* (Mar. 17, 2006), *available at* http://www.sec.gov/news/speech/spch031706css.htm#7 6

Statement of the SEC on the Regulation of 'Pegging, Fixing, and Stabilizing' of Security Prices, SEC Release No. 34-2446, 11 Fed. Reg. 10971 (Mar. 18, 1940) 9

Michelle Tsai & Lynn Cowan, *Chinese IPOs Stick Close to Home*, WALL ST. J., Mar. 20, 2006, at C4 28

BRIEF OF *AMICI CURIAE* IN SUPPORT OF PETITIONERS

INTEREST OF THE *AMICI CURIAE*[1]

The interest of the *amici curiae* is described in the accompanying motion for leave to file this brief.

SUMMARY OF ARGUMENT

The process of distributing an initial public offering (IPO) in the United States is governed by a comprehensive, extraordinarily intricate regulatory program. That program consists of (a) statutes; (b) a vast corpus of rules, restrictions, and guidance promulgated by the Securities and Exchange Commission (SEC); and (c) the rules of the "self-regulatory organizations" (SROs), *i.e.*, the National Association of Securities Dealers (NASD) and the stock exchanges. Literally every aspect of an IPO is subject to the SEC's and SROs' oversight. The capital markets, moreover, are unique, complex mechanisms. As their expert steward, the SEC has been charged with balancing a number of policy goals, including competition, efficiency, and the formation of capital. The tension among those goals is especially pronounced in the context of fixed-price securities offerings, and the SEC, in fulfilling its mandate, frequently draws nuanced distinctions designed to calibrate the competing concerns.

The regime governing the IPO process, then, is a "pervasive" regulatory scheme of the kind that compels a recognition of implied antitrust immunity. *Verizon Commc'ns Inc.* v. *Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004); *United States* v. *Nat'l Ass'n of Sec. Dealers, Inc.*, 422 U.S. 694, 730 (1975) (*NASD*). The SEC's supervision of the IPO process

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[1] Under Rule 37.6 of the Rules of this Court, *amici curiae* state that no counsel for a party has written this brief in whole or in part and that no person or entity, other than the *amici curiae*, their members, or their counsel, has made a monetary contribution to the preparation and submission of this brief.

is so extensive that, just as in *NASD*, immunity is necessary to avoid "the disruption of conflicting judgments that might be voiced by courts"—and juries—"exercising jurisdiction under the antitrust laws." 422 U.S. at 734. This is all the more true because here, as in *Trinko* and *NASD*, the agency seeks to promote competition, among other objectives.

It is no answer to suggest that antitrust law and securities regulation can work together, either by incorporating securities principles into the antitrust Rule of Reason or by isolating discrete practices that the SEC has not authorized or cannot authorize. To let twelve courts of appeals and countless juries apply an all-things-considered test would result in the exact opposite of the uniform regulation Congress deemed desirable in this vital area of economic activity. To hold a hearing in each antitrust case to ascertain the limits of the SEC's authority would combine two notoriously difficult kinds of cases—judicial review of administrative action (or *hypothetical* action) and antitrust litigation—in a single, unwieldy proceeding. No doctrinaire insistence that antitrust law has a role to play in every industry is required by, or consistent with, this Court's precedents.

The court of appeals did not appreciate these considerations and instead became hung up on the fact that the complaints appear, in part, to allege conduct that is flatly prohibited by the securities laws. But that approach "fail[s] to recognize or give effect to the full scope of" antitrust immunity, U.S. Cert.-Stage Br. 8. Where, as here, the concern is with averting the danger of collision between competing legal spheres, the question is not whether the regimes conflict as to each and every particular practice alleged in a complaint, but rather whether the two regimes are broadly compatible. *Buckman Co.* v. *Plaintiffs' Legal Committee*, 531 U.S. 341 (2001). As explained in *Buckman* and *Brown* v. *Pro Football, Inc.*, 518 U.S. 231 (1996)—a case strikingly congruent to this one—engrafting onto a finely tuned system of regulation the possibility of liability from a competing legal regime tends to distort incentives for the regulated entities, and thus can greatly

diminish the importance of the distinctions drawn by the regulatory system.

In this case, if the line of immunity merely tracked the securities rules and gave them no berth, a plaintiff's attorney could too easily plead around an immunity defense and thereby gain discovery and possible class certification, and all while wielding the hammer of treble damages liability. (This is one reason why a remand for re-pleading to conform to the securities laws would serve no useful purpose.) In the real world of financial dealings, IPO participants would respond by steering so wide of the SEC's carefully drawn lines as to make those lines meaningless.

This overdeterrence of useful conduct would be a problem for the whole economy, not just the investment banking firms. The prospect of antitrust liability here would make syndicates riskier for underwriters (who would therefore charge issuers a higher risk premium) and chill conversations used to build demand and thus arrive at an offering price more favorable to the issuer. The result would be to increase the cost of capital for issuers—in other words, to make IPOs more expensive. It follows that financing would become more difficult, and some companies that would otherwise have gone public will choose not to do so. Others will choose to list on foreign exchanges rather than in the United States. Recent years have seen a dramatic migration of IPOs of foreign (and some U.S.) companies from our shores to overseas markets, and one of the most frequently cited reasons for the trend is the comparatively large regulatory burdens and litigation risks associated with the U.S. markets. An affirmance by this Court would exacerbate that trend. For all of these reasons, the antitrust claims at issue serve no useful purpose, and the district court was right to dismiss them.

ARGUMENT

I. The SEC and NASD Pervasively Regulate The IPO Process So As To Balance Competition Against Other Essential Objectives

A. Capital markets are complex, sensitive mechanisms, as the legislators who developed much of the regulatory structure that governs those markets recognized over 70 years ago. See H.R. Rep. No. 73-1383, at 4 (1934); S. Rep. No. 73-792, at 5 (1934). Since then, Congress has continually monitored that structure, and in 1996, it specifically instructed the SEC to take account of competitive considerations, but also to balance those considerations against a number of other policy objectives, including the protection of investors, the promotion of efficiency, and "capital formation." See National Securities Markets Improvement Act of 1996 (NSMIA), Pub. L. No. 104-290, § 106, 110 Stat. 3416, 3424-3425, codified at 15 U.S.C. §§ 77b(b), 78c(f), 80a-2.[2]

The goals the SEC must balance are not always in harmony. As a leading antitrust scholar has explained:

> [Antitrust's] goals are much narrower than those of the [SEC], which is certainly concerned with the competitiveness of securities markets, but also with the viability of sellers, with the truthfulness of information, with sharp practices that may injure customers, and with the smooth functioning of trading institutions.

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[2] This is not to say that, before 1996, the SEC never factored competition into the mix. On the contrary, it had a long history of doing so. See, *e.g.*, *NASD*, 422 U.S. at 732-733 (citing *In re NASD, Inc.*, 19 S.E.C. 424 (1945), and *In re NASD, Inc.*, 9 S.E.C. 38 (1941)); see also Securities Acts Amendments of 1975, Pub. L. No. 94-29, § 12, 89 Stat. 97, 127-128 (amending 15 U.S.C. § 78o-3 so that subsection (b)(9) requires NASD rules to "impose [no] burden on competition not necessary or appropriate in furtherance of the purposes of" the Securities Exchange Act of 1934).

> For the SEC these various goals may sometimes be in conflict and must be balanced against each other. By contrast, antitrust is myopic, and is concerned only with preserving competitive markets in the short run.

Herbert Hovenkamp, *Antitrust Violations in Securities Markets*, 28 J. CORP. L. 607, 609 (2003); see also *id.* at 633 (noting that "the regulatory process is often concerned with more [than antitrust], including the vitality of the markets * * * and even the economic health of regulated firms"); see also *Nat'l Soc'y of Prof'l Eng'rs* v. *United States*, 435 U.S. 679, 692 (1978) ("the purpose of [antitrust] analysis is to form a judgment about the competitive significance of the restraint; it is not to decide whether a policy favoring competition is in the public interest").

The tension between competition and other regulatory objectives is especially pronounced with respect to the distribution of securities. In a market economy, sellers usually allocate scarce goods among buyers by means of price negotiation or auction—in other words, through competitive pricing. Cf. *Nat'l Soc'y of Prof'l Engineers*, 435 U.S. at 692 (describing price as "the 'central nervous system of the economy'").

In the world of fixed-price offerings of new securities, however, competition over price is *suppressed*, because every investor in such an offering is required to pay the same price. See, *e.g.*, Letter from Gary L. Goldsholle to Dana Fleischman (Nov. 24, 2003), *available at* http://tinyurl.com/yhocak (NASD guidance noting that NASD "Rule 2740 is intended to ensure that all purchasers in a fixed price offering pay the fixed offering price"). This requirement, which antedates even the creation of the SEC, stems from a concern that if "certain purchasers bought shares at a discount * * *, it would discourage others from buying at the public offering price" and thus "disrupt[] the capital formation process." *Id.* (citing Order Approving Proposed Rule Change, SEC Release No. 34-17371, 45 Fed. Reg. 83707 (Dec. 19, 1980) (in turn citing 1934 authorities)).

If, however, a seller of scarce products is not in a position to negotiate price freely, the seller will find some other method for achieving a sensible allocation among the more-than-sufficient buyers willing to pay the fixed price. The regulators are aware of this point, which is why (as discussed below) they permit the longstanding practice of allocating "hot" securities issues in ways that favor "better" customers.[3] That is, in the context of fixed-price offerings, the securities industry, with the SEC's blessing and in part because of SEC requirements, has dispensed with one of the fundamental underpinnings of antitrust regulation (free price competition) in exchange for other benefits related to the special needs of the capital markets and the Commission's unique regulatory mandate.

B. The SEC and NASD (an SRO, the rules of which are promulgated under SEC supervision, see 15 U.S.C. § 78o-3) energetically fulfill their mandate in the IPO context. As the district court and the SEC explained below, the SEC has "plenary authority" over the IPO process, Pet. App. 97a, which is governed front to back by an extraordinarily extensive matrix of regulation. Taken together, the Securities Act of 1933, the Securities Exchange Act of 1934, the SEC's regulations, and the NASD's rules cover and constrain: the registration of securities; the formation of syndicates; communications among syndicate members; communications between syndicate members and the public, including potential IPO customers; underwriter compensation, including commission structure and fee arrangements; the allocation of shares; and stabilizing

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[3] See, *e.g.*, Chester S. Spatt, *Financial Regulation: Economic Margins and "Unintended Consequences"* (Mar. 17, 2006), *available at* http://www.sec.gov/news/speech/spch031706css.htm#7 (speech by SEC's chief economist explaining that, "if the seller allocates the offering securities to those investors whose indications of interest during the road show had the largest values, then even though these indications are not binding, the same allocations as in an optimal auction arise").

activities in the aftermarket. See *id.* at 86a-119a (district court opinion); 132a-139a (SEC *amicus* brief).

This regulatory corpus, moreover, reaches precisely the types of activities targeted by plaintiffs. To the extent the complaints here allege anything beyond perfectly normal, lawful activity, the nub of the accusation seems to be that underwriters exacted from their customers undisclosed consideration in exchange for allocation of IPO shares. That consideration allegedly took several related forms, including: (1) commitments to buy (and thereby "ladder" up the price of) the issuer's shares in the aftermarket; (2) commitments to buy other securities, including the issuer's shares in a secondary public offering (*i.e.*, a "tie-in"); and (3) "non-competitively determined commissions on the purchase and sale of other securities." Consol. Compl. ¶¶ 6-8, 42; Pfeiffer Compl. ¶ 116-121. Each of those supposed practices implicates detailed regulations that frequently draw subtle distinctions between the permissible and the impermissible.

Most fundamentally, the SEC requires that the compensation for underwriters of a securities offering be disclosed to the public and approved by the NASD. See 17 C.F.R. §§ 229.508(e), 230.461(a). The NASD in turn defines and limits the compensation that issuers may pay underwriters, and imposes detailed disclosure requirements of its own in that regard. See NASD Rule 2710: Corporate Financing Rule—Underwriting Terms and Arrangements. Relatedly, the NASD regulates the granting of concessions and discounts in connection with the sale of securities in fixed-price offerings. See NASD Rule 2740: Selling Concessions, Discounts and Other Allowances.

The SEC and NASD, moreover, regulate practices through which IPO allocations are linked to transactions in other securities. The history of SEC attention to this subject stretches back decades.[4] Most recently, the Commission has proposed a

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[4] See, *e.g.*, REPORT OF THE SEC CONCERNING THE HOT ISSUES

rule that would prohibit participants in an offering "from demanding, soliciting, or attempting to induce, or accepting an offer from their customers of any payment or other consideration"—including the purchase of a different security—"in addition to the security's stated consideration." Amendments to Regulation M: Anti-Manipulation Rules Concerning Securities Offerings, SEC Release No. 34-50831, 69 Fed. Reg. 75774, 75785 (Dec. 17, 2004) ("Amendments to Regulation M"). At the same time, however, the SEC clarified that a firm may permissibly "allocat[e] IPO shares to a customer because the customer has separately retained the firm for other services, when the customer has not paid excessive compensation in relation to those services." *Ibid.*

For the NASD's part, it has proposed a rule that would prohibit an NASD member from "offer[ing] or threaten[ing] to withhold" IPO shares "as consideration or inducement for the receipt of compensation that is excessive in relation to the services provided by the member." Notice of Filing of Proposed Rule Changes, SEC Release No. 34-50896, 69 Fed. Reg. 77804, 77805 (Dec. 28, 2004). At the same time, however, the NASD's adjudicative arm recognizes that a customer may legitimately compete for IPO shares by increasing the level and quantity of commissions it pays to a firm in a position to control IPO allocations. See *Dep't of Enforcement* v. *Invemed Assocs.*, No. CAF030014, at 12-13 (NASD Office of Hearing Officers Mar. 3, 2006) (appeal pending).

Against this backdrop, consider the plaintiffs' accusations of tie-ins and "non-competitively determined" commissions on trades in other securities as a *quid pro quo* for IPO allocations. To repeat (assuming the proposed rules are adopted), an underwriter may allocate IPO shares to a good customer, but

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MARKETS 37-39 (Aug. 1984); Certain Short Selling of Securities and Securities Offerings, SEC Release No. 34-10636, 39 Fed. Reg. 7806 (Feb. 11, 1974); SEC Release No. 33-4358, 1961 WL 61584 (Apr. 24, 1961).

may not accept extra consideration for IPO shares or "excessive" compensation for non-IPO business. The distinction here between the permissible and impermissible, though rational, is subtle, and there is no reason to think that it would impress a jury (or even a judge) conducting an antitrust inquiry. Yet it is precisely through distinctions like this that the SEC reconciles the promotion of competition with competing interests like capital formation and efficiency.

A similar problem arises with the "laddering" allegations. Underwriters typically seek to allocate IPO shares to customers who they believe will buy and hold, rather than "flip" for a short-term profit. This is entirely appropriate. In fact, the SEC has long recognized the legitimate interest in stabilizing the price of a new security,[5] and today the Commission comprehensively regulates underwriters' use of stabilization and anti-flipping practices. See *Friedman* v. *Salomon/Smith Barney, Inc.*, 313 F.3d 796, 801-802 (2d Cir. 2002); 15 U.S.C. § 78i(a)(6); 17 C.F.R. §§ 240.17a-2, 242.104; see also 69 Fed. Reg. at 77805 (proposed NASD restrictions on anti-flipping penalties). These regulations seek to guard against anti-competitive abuse while still promoting the formation of capital.

If an underwriter is to place securities with longer-term investors, it somehow must determine the intentions of those seeking IPO shares. See, *e.g.*, SECURITIES INDUSTRY ASSOCIATION, CAPITAL MARKETS HANDBOOK § 5.08, at 5-13, 5-14 (John C. Burch, Jr. & Bruce S. Foerster eds., 6th ed. 2007) ("One of the major decision-making tasks facing the lead manager is the determination of why any investor, but particularly an institutional investor, is buying the security

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[5] See, *e.g.*, Reports on Stabilizing Activities, SEC Release No. 34-9605, 37 Fed. Reg. 10960 (May 24, 1972); SEC, Reports on Stabilizing Activities, 21 Fed. Reg. 501 (Jan. 13, 1956); *In re NASD, Inc.*, 19 S.E.C. 424 (1945); Statement of the SEC on the Regulation of 'Pegging, Fixing, and Stabilizing' of Security Prices, SEC Release No. 34-2446, 11 Fed. Reg. 10971 (Mar. 18, 1940).

being distributed. * * * Making allocation decisions correctly is at the heart of deal making."). In this regard, the SEC has given detailed guidance as to the types of conversations that are permitted and prohibited between underwriters and prospective investors. See Commission Guidance Regarding Prohibited Conduct in Connection with IPO Allocations, SEC Release No. 33-8565, 70 Fed. Reg. 19672, 19674-76 (Apr. 13, 2005) ("Guidance Regarding Prohibited Conduct").

Here, too, the distinctions are subtle, but rational. The SEC has determined that it is permissible during the "book-building" process[6] for an underwriter to "inquir[e] as to a customer's desired future position in the longer term (for example, three to six months), and the price or prices at which the customer might accumulate that position without reference to immediate aftermarket activity." Guidance Regarding Prohibited Conduct, 70 Fed. Reg. at 19676. By contrast, if a representative of the underwriter "[s]olicit[s] customers prior to the completion of the distribution regarding whether and at what price and in what quantity they intend to place immediate aftermarket orders for IPO stock," the representative has violated Regulation M, 17 C.F.R. §§ 242.100 – .105 (2005), which prohibits inducing bids and purchases before the end of a distribution. Guidance Regarding Prohibited Conduct, 70 Fed. Reg. at 19675.

Thus, discussions about the immediate aftermarket must tread a fine line: an underwriter may attempt to determine (a) whether a potential investor intends to *hold* or *sell* in the *immediate aftermarket* and (b) how much of the stock, and at

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[6] "Book-building" is the process by which underwriters attempt to determine the price at which to offer a security, based on indications of interest from institutional investors as to how many shares they would be interested in buying and at what price. See, *e.g.*, Guidance Regarding Prohibited Conduct, 70 Fed. Reg. at 19674. This process, among other functions, helps the underwriters avoid a failed underwriting—one in which investors are unwilling to purchase the securities at the offering price.

what price, the potential investor desires to own *several months* from the IPO, but must not (c) discuss the customer's intentions regarding *buying* in the *immediate aftermarket*. When and where in this scheme a discussion becomes unacceptable is a question on which an antitrust jury could easily differ from the SEC.

II. The Pervasive Regulation Of The IPO Process Shields These Complaints From Antitrust Attack

A. "[A] detailed regulatory scheme * * * ordinarily raises the question whether the regulated entities are not shielded from antitrust scrutiny altogether by the doctrine of implied immunity." *Verizon Commc'ns Inc.* v. *Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 406 (2004) (citing *NASD* and *Gordon* v. *New York Stock Exchange, Inc.*, 422 U.S. 659 (1975)). In such cases, immunity "avoid[s] the real possibility of judgments conflicting with the agency's regulatory scheme 'that might be voiced by courts exercising jurisdiction under the antitrust laws.'" *Ibid.* (quoting *NASD*).[7]

Immunity is especially appropriate when the regulatory regime requires the agency "to deter and remedy anticompetitive harm," 540 U.S. at 412. For example, in *Hughes Tool Co.* v. *Trans World Airlines, Inc.*, 409 U.S. 363, 385 (1973), this Court concluded that the Civil Aeronautics Board's authority under the Federal Aviation Act to regulate corporate control of air carriers "pre-empts the antitrust field." The Board's authority was extensive and broad ranging, and it was required to take competitive considerations, among others, into account. In *Trinko*, conduct regulated by the Telecommunications Act of 1996 would have been a "good candidate" for antitrust

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[7] As explained at greater length in petitioners' brief, *NASD* and *Gordon* contemplate at least two types of situations in which repugnance between a set of regulations and antitrust gives rise to immunity: (1) active regulation of the challenged conduct, and (2) a pervasive regulatory scheme. *Amici* focus on the second category but agree with petitioners' arguments respecting the first.

immunity, in part because the applicable regime was an "effective steward of the antitrust function," 540 U.S. at 406, 413. Immunity was unavailable in *Trinko* because of an explicit savings clause, but in *NASD*, where there was no such clause, SEC-regulated conduct was held immune because of a pervasive regulatory scheme that also served as an "effective steward" of competition.

NASD arose out of accusations that a number of securities firms and the NASD were unlawfully restricting the secondary market for mutual fund shares. Count I of the United States' complaint charged a horizontal conspiracy and included allegations of activities that were neither required nor authorized by the applicable statutes, including "discourag[ing] persons who made inquiry about the legality of a brokerage market from participating in a brokerage market," "distribut[ing] misleading information * * * concerning the legality of a brokerage market in mutual fund shares," and "induc[ing] * * * underwriters to include restrictive provisions in their sales agreements." This Court acknowledged that such activities "cannot find antitrust shelter" in the applicable statutes but nonetheless held that "the SEC's exercise of regulatory authority under [the Investment Company Act of 1940] and the Maloney Act is *sufficiently pervasive* to confer an implied immunity." 422 U.S. at 730 & n.42 (emphasis added).

The Court reached that conclusion after a review of the statutory regime governing the distribution of mutual fund shares, as well as the history of abuses that that regime was designed to combat. 422 U.S. at 704-719. "There can be little question," the Court observed, "that the broad regulatory authority conferred upon the SEC * * * enables it to monitor the activities questioned in Count I, and the history of Commission regulations suggests no laxity in the exercise of this authority." *Id.* at 734. Moreover, the SEC, which is "charged with protection of the public interest as well as the interests of shareholders," had "repeatedly * * * indicated that it weighs competitive concerns in the exercise of its continued supervisory responsibility." *Id.* at 732. The Court conclud-

ed—even though the SEC had taken no position on whether Count I should be dismissed—that "[t]he investiture of such pervasive supervisory authority in the SEC suggests that Congress intended to lift the ban of the Sherman Act" with respect to the activity at issue. *Id.* at 733. This Court was concerned above all that "maintenance of an antitrust action for activities so directly related to the SEC's responsibilities poses a substantial danger that appellees would be subjected to duplicative and inconsistent standards." *Id.* at 735.

B. Those principles have direct application here. The IPO process is subject to a pervasive regulatory scheme, one that is far more extensive than the regime governing mutual fund pricing and distribution at issue in *NASD*.[8] The SEC and self-regulatory organizations have expertly woven an extraordinarily elaborate fabric of regulation. Superimposing antitrust claims—claims often adjudicated by juries, which are poorly equipped to engage in the type of careful line drawing done by the SEC—would create, just as in *NASD*, a substantial danger of "duplicative and inconsistent standards," 422 U.S. at 735.

This is all the more true because the SEC already "weighs competitive concerns," 422 U.S. at 732—although not to the exclusion of all else. Consider once again that, in the IPO

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[8] Apart from the Maloney Act, 15 U.S.C. § 78o-3, which confers general supervisory authority over a registered national securities association, two statutory provisions were at issue in the *NASD* opinion. One, Section 22(d) of the Investment Company Act of 1940, 15 U.S.C. § 80a-22(d), provides that a mutual fund company or a dealer may sell mutual fund shares to the public only at a current public offering price described in the company's prospectus. 422 U.S. at 711 & n.20. The other, Section 22(f) of the same Act, 15 U.S.C. § 80a-22(f), authorizes a mutual fund company to restrict the negotiability or transferability of its shares, provided the restrictions are disclosed in the company's registration statement and do not violate any SEC rules and regulations on the subject (of which there were none). 422 U.S. at 720-721 & n.33.

context, long-standing practices approved by the SEC sometimes *suppress* price competition, and thus dispense with one of the basic moorings of antitrust law. See pages 5-6, *supra*. In theory, one can respond to that fact in at least two ways. One can try to jerry-build antitrust law for a situation in which ordinary price competition is not possible—in other words, ask a jury to apply the Rule of Reason in a way that takes account of regulatory context, as the Second Circuit suggested. Or one can recognize that the most fundamental underpinnings of antitrust law have been so changed by SEC regulation and SEC-approved practices that a single, coherent body of law should check any departures from the *proper remaining* role of competition in allocating new securities issues. The second course, which follows from this Court's precedents, is sounder.

C. The approaches advanced by the court of appeals and by plaintiffs would fragment IPO regulation to an unacceptable degree. The Second Circuit panel suggested (Pet. App. 58a) that antitrust law is sufficiently flexible to take into account securities regulation concerns through the Rule of Reason, and plaintiffs have contended (see *id.* at 62a) that antitrust immunity is unavailable when the SEC has no authority to permit the challenged practice. But there is no reason to think that each of the twelve federal courts of appeals with jurisdiction over securities cases would come to identical conclusions as to either inquiry. This consideration alone should suffice to invoke implied immunity, for Congress, in enacting the securities laws, clearly envisioned a uniform law throughout the United States. The SEC provides that uniformity. Twelve diverse circuits cannot. (Nor, for that matter, can this Court, which is not in a position to review every mixture of antitrust and SEC governance.)

Under the Second Circuit's Rule of Reason suggestion, judges and juries in each circuit would have to balance antitrust along with each of the policy goals that Congress has assigned to the SEC. Worse still, that balancing might take place in 50 state judiciaries under state antitrust laws. No underwriter could

know in advance what court or jury it might face. For related reasons, equally flawed is plaintiffs' suggestion that antitrust be available when an act is one the SEC has no power to permit. Every trial would require a determination of the SEC's authority in the area. Thus, the equivalent of judicial review of an SEC proceeding—and often a hypothetical proceeding—would precede the antitrust trial. This, too, would complicate the progress of litigation, let alone attempts by underwriters to anticipate its outcome, thus further undermining the uniformity of regulation sought by Congress.

III. Immunity Is Not Defeated Simply Because The Complaints Contain Allegations Of Conduct In Violation Of The Securities Laws

The court of appeals resisted immunity because portions of the complaints allege conduct that violates the securities laws. See Pet. App. 65a-67a, 70a. The court of appeals, however, as the United States agrees in urging reversal, "failed to recognize or give effect to the full scope" of antitrust immunity. U.S. Cert.-Stage Br. 8. Where pervasive regulation is concerned, immunity from antitrust does not hinge on whether, as to each specific allegation, there is a literal conflict between antitrust and the securities laws. Rather, the question must be whether the application of antitrust law to this *area of activity* would interfere with the operation of securities regulation. As the SEC explained below: "the concern is with protecting *the full scope of the regulatory regime*, and of the Commission's freedom to act, not with whether the particular conduct has been approved." Pet. App. 149a-150a (emphasis added). That is, the line of immunity must give some berth to the line separating permissible and impermissible conduct under the securities laws, or the objectives of the immunity doctrine will be defeated.

A. As an initial matter, the court of appeals was simply wrong when it stated that, "in every case in the securities context in which this Court or the Supreme Court has ever found implied antitrust immunity, the courts have done so in the wake of SEC authorization—whether past or present—of the specific

anticompetitive behavior," Pet App. 66a. In *NASD*, this Court dismissed even a charge that included allegations of activities that had never been authorized by the SEC. See pages 12-13, *supra*; *NASD*, 422 U.S. at 730 ("It is clear, however, that Count I alleges activities that are neither required by § 22 (d) nor authorized under § 22 (f). And since they cannot find antitrust shelter in these provisions of the Investment Company Act, the question presented is whether the SEC's exercise of regulatory authority * * * is sufficiently pervasive to confer an implied immunity. We hold that it is * * *.").

In the words of the leading antitrust treatise, *NASD* "invoke[d] the broad dangers of collision between antitrust and regulatory regimes *rather than a narrow assessment of the challenged conduct itself. NASD* asked whether *spheres of immunity* are necessary to avoid potential conflict, not whether *an immunity for a specific practice is necessary* to advance particular legislative goals." 1A PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 243d, at 325 (3d ed. 2006) (emphasis added and footnote omitted).

Moreover, the panel's statement was limited to the relatively small pool of Supreme Court and Second Circuit cases on antitrust immunity "in the securities context," Pet. App. 66a. Outside that pool, however, where a pervasive regulatory regime has competed with antitrust, this Court and other courts have discerned implied antitrust immunity even for alleged violations of the competing regime. See, *e.g.*, *U.S. Navigation Co.* v. *Cunard S.S. Co.*, 284 U.S. 474, 485 (1932) ("[T]he allegations either constitute direct and basic charges of violations of [the Shipping Act], or are so interrelated with such charges as to be, in effect, a component part of them; and the remedy is that afforded by the Shipping Act, which to that extent supersedes the anti-trust laws."); *Keogh* v. *Chicago & N.W. Ry. Co.*, 260 U.S. 156, 162 (1922) (dismissing the possibility that Congress could have intended a shipper who had been forced to pay rates illegal under the Interstate Commerce Act to have "an additional remedy under the Anti-Trust Act"); *Schaefer* v. *First Nat'l Bank of Lincolnwood*, 509 F.2d 1287,

1300 (7th Cir. 1975) (dismissing antitrust claim based on scheme to inflate the price of a stock because "[t]he sort of manipulation scheme underlying the plaintiffs' claim here was envisioned to be fully dealt with under the securities acts"); see also *Hughes Tool*, 409 U.S. at 385 (agency's authority over corporate control of air carriers "pre-empts the antitrust field"); cf. *Trinko*, 540 U.S. at 406 (allegations of conduct in violation of the Telecommunications Act of 1996 were a "good candidate" for implied antitrust immunity because of the "detailed regulatory scheme" created by the Act).

B. More generally, any inquiry designed to avoid the "broad dangers of collision between" two legal regimes, AREEDA & HOVENKAMP, *supra*, ¶ 243d, must look at more than just whether the regimes directly clash with respect to the specific conduct at issue.

1. This point is illustrated by *Buckman Co.* v. *Plaintiffs' Legal Committee*, 531 U.S. 341 (2001), in which plaintiffs claiming injury from orthopedic bone screws asserted state-law claims based on allegations that the defendant consulting company had made fraudulent representations to the Food and Drug Administration (FDA or Administration) in connection with the manufacturer's application for regulatory approval. There was no suggestion that federal law permitted the alleged conduct on which the state-law claims were based. In fact, it was precisely because the applicable federal statutes conferred on the FDA "a variety of enforcement options that allow it to make a measured response to suspected fraud upon the Administration," *id.* at 349, that the state-law claims were impliedly preempted:

> [T]he federal statutory scheme amply empowers the FDA to punish and deter fraud against the Administration, and * * * this authority is used by the Administration to achieve *a somewhat delicate balance of statutory objectives*. The balance sought by the Administration can be skewed by allowing fraud-on-the-FDA claims under state tort law.

Id. at 348 (emphasis added).

Buckman turned on the fact that Congress had created—just as it did in the securities context—a "statutory and regulatory framework under which the [agency] pursues difficult (and often competing) objectives." 531 U.S. at 349. Because the state-law litigation "would exert an extraneous pull on" that careful scheme, *id.* at 353—just as antitrust litigation would disrupt and undermine the SEC's regulation of the IPO process—the two regimes were broadly incompatible. *Buckman*, moreover, recognized that allowing state-law liability to compete with the comprehensive, fine-tuned federal regulatory program would distort incentives for the regulated entities. Potential applicants for FDA approval might be discouraged from seeking certain kinds of approval, or might "submit a deluge of information that the Administration neither wants nor needs" to avoid the possibility that disclosures would be judged insufficient by a court applying state law. *Id.* at 350-351.

It is the same here. If plaintiffs' antitrust claims are sustained, the securities industry will be discouraged from practices and communications that the SEC has recognized as beneficial and in the public interest, because participants will want to avoid being second-guessed by an antitrust court and jury. (It must be remembered as well that federal and state antitrust laws carry criminal penalties in addition to civil liability.) The financial community will thus experience what this Court has described as "the problem of 'overdeterrence,' *i.e.*, the possibility that severe antitrust penalties will chill wholly legitimate business arrangements." *Texas Indus., Inc.* v. *Radcliff Materials, Inc.*, 451 U.S. 630, 637 (1981); see also Pet. App. 193a-194a (SEC warning panel against "discouraging useful interactions among participants in the offering process" and thus "over-deter[ring] conduct that would serve the interests of the markets and the capital formation process").

2. Precisely these concerns were at play in *Brown* v. *Pro Football, Inc.*, 518 U.S. 231 (1996), in which this Court explained how incentives are distorted when an antitrust attack is superimposed onto a subtle regulatory program. The question

in *Brown* was whether the "implicit antitrust exemption that applies where needed to make the collective-bargaining process work" applied to an agreement that football club owners made unilaterally after they reached impasse with the players' union. *Id.* at 234. The United States as *amicus* urged that the antitrust exemption "should terminate at the point of impasse" because at that point employers are no longer under a labor-law duty to bargain collectively. *Id.* at 244.

This Court rejected that position. Among other difficulties, impasse is not a black-and-white issue. 518 U.S. at 245-246 ("'[I]mpasse' is often temporary * * * . How are employers to discuss future bargaining positions during a temporary impasse?"). Accordingly, employers trying to guess "how an *antitrust* court would later draw the impasse line" would be put in an impossible position:

> Employers who erroneously concluded that impasse had *not* been reached would risk antitrust liability were they collectively to maintain the status quo, while employers who erroneously concluded that impasse *had* occurred would risk unfair labor practice charges for prematurely suspending multiemployer negotiations.

Id. at 246. Rather than make the antitrust exemption trace the line governing the labor-law duty, this Court decided not to leave antitrust courts and their juries "free to second-guess the parties' bargaining decisions." *Ibid.*

This case is the same. If, as the Second Circuit thought sufficient, the line of antitrust immunity traces the line governing the securities-law duty, a securities firm participating in an IPO would be put in the same impossible position as the employers in *Brown*. The firm either would risk antitrust liability for conduct that it believed was consistent with the securities laws, or steer so wide of the SEC's lines (in an effort to avoid antitrust liability) as to avoid potentially productive arrangements.

As if to underscore the similarities between *Brown* and this case, in *Brown* the United States urged this Court to "look[] to

antitrust law's 'rule of reason' to shield—'in some circumstances'—[certain types of] joint actions." 518 U.S. at 246. The Court rejected that and other suggestions for "softening" the bite of antitrust while retaining a role for it in an area pervasively regulated by another body of law. *Ibid.* Yet, in the present case, the Second Circuit panel—which suggested that SEC regulation could be a "consideration" in applying the antitrust Rule of Reason on remand, Pet. App. 58a—accepted just the reasoning this Court rejected in *Brown*. In the panel's view, the "flexibility" to take regulation into account in some ill-defined way "lower[ed] the stakes of any implied immunity evaluation." *Id.* at 60a.

This Court in *Brown*, by contrast, understood that it was not a virtue to apply, after-the-fact, a "flexible"—one might just as well say amorphous—doctrine to conduct otherwise governed by ascertainable standards. See 518 U.S. at 247 (warning against "forcing [negotiators] to choose their collective-bargaining responses in light of what they predict or fear that antitrust courts, not labor law administrators, will eventually decide"). The problem of distorted incentives is enhanced, not diminished, when parties familiar with securities regulation must predict what the Rule of Reason will have to say years later—something even the greatest antitrust experts can rarely do with confidence.[9]

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[9] See Frank H. Easterbrook, *The Limits of Antitrust*, 63 TEX. L. REV. 1, 12 (1984) ("When everything is relevant, nothing is dispositive. * * * The formulation offers no help to businesses planning their conduct. Faced with a list of such imponderables, lawyers must engage in ceaseless discovery."). See also FEDERAL TRADE COMMISSION & U.S. DEP'T OF JUSTICE, ANTITRUST GUIDELINES FOR COLLABORATIONS AMONG COMPETITORS § 3.3 (2000), *available at* http://www.ftc.gov/os/2000/04/ftcdojguidelines.pdf ("Rule of reason analysis entails a flexible inquiry and varies in focus and detail depending on the nature of the agreement and market circumstances. * * * Ordinarily, * * * no one factor is dispositive in the analysis.").

Here, under the rule adopted below, underwriters would be put in precisely the quandary described by Chief Justice White (the author of the Rule of Reason, see *Standard Oil Co. of New Jersey* v. *United States*, 221 U.S. 1, 66-67 (1911)) in holding unconstitutional the federal Lever Act, which made it illegal to charge any "unjust or unreasonable" price for "any necessaries." *United States* v. *L. Cohen Grocery Co.*, 255 U.S. 81, 86 (1921). That statute, Chief Justice White wrote for the Court, "forbids no specific or definite act" and therefore

> leaves open * * * the widest conceivable inquiry, the scope of which no one can foresee and the result of which no one can * * * adequately guard against. In fact, * * * to attempt to enforce the [statute] would be * * * equivalent * * * to carry[ing] out a statute which in terms merely penalized and punished all acts detrimental to the public interest when unjust and unreasonable in the estimation of the court and jury.

Id. at 89.

For all of these reasons, the Second Circuit panel approached the issue from the wrong end of the telescope when it assessed the antitrust immunity of the plaintiffs' pleading-stage allegations only after examining them through the lens of the securities laws. The first question has to be not whether the securities laws do or do not allow each particular allegation, but rather whether the entire scheme of securities regulation in this area will be disrupted if it must constantly edge right up against antitrust. From the standpoint of *amici*'s members—that is, participants in the real world of financial dealings who must order their conduct based on predictions about liability—an immunity defense that extends no further than the lines drawn under the applicable pervasive regulatory regime is very little comfort.

C. Some hypothetical examples should concretely illustrate these concerns, and show how easy it would be for a plaintiff to plead around an immunity defense that is precisely co-extensive with the securities regulations.

As discussed above, see pages 7-8, *supra*, the SEC has proposed a rule that would prohibit participants in an offering "from demanding, soliciting, or attempting to induce, or accepting an offer from their customers of any payment or other consideration in addition to the security's stated consideration." Amendments to Regulation M, 69 Fed. Reg. at 75785. At the same time, however, the SEC clarified that "the proposed rule is not intended to interfere with legitimate customer relationships" and that it would be permissible for a firm to "allocat[e] IPO shares to a customer because the customer has separately retained the firm for other services, when the customer has not paid excessive compensation in relation to those services." *Ibid.* Indeed, it is "standard practice throughout the securities industry" for customers desiring IPO allocations "to compete for them by the amount of non-IPO commission revenue they generate." *Dep't of Enforcement* v. *Invemed Assocs.*, No. CAF030014, at 12-13 (NASD Office of Hearing Officers Mar. 3, 2006) (appeal pending).

Suppose the SEC's proposed rule is formally promulgated. Suppose as well that a putative class could truthfully but generically allege that a customer named Institutional Investor, in the months before the eagerly awaited Widget IPO, substantially increased over historic levels the volume of securities trades it placed through financial-services firm Underwriter Defendant, resulting in additional commissions for Underwriter Defendant. Suppose further that in the Widget IPO, in which Underwriter Defendant is a member of the syndicate, Institutional Investor is awarded a significant portion of shares. This scenario might well be consistent with the securities laws, because a customer may increase the volume of orders with a view toward obtaining IPO allocations, see *Invemed Assocs.* at 13-17, and an underwriting firm, or the syndicate of which it is a member, may allocate IPO shares to a favored customer that has retained the firm for other services, see *ibid*; 69 Fed. Reg. at 75785.

Plaintiffs' counsel, however, would undoubtedly attempt to assert an antitrust claim based on allegations that the additional

commissions on the unrelated transactions were "consideration in addition to the security's stated consideration," Amendments to Regulation M, 69 Fed. Reg. at 75785, resulting from what the plaintiffs would call collusion between the syndicate and the customer, or within the syndicate. Because such additional consideration is prohibited by the SEC, plaintiffs' counsel would have little difficulty arguing—if the line of immunity is precisely coextensive with the SEC's lines—that it would be subject to antitrust attack. Such an allegation might well survive a motion to dismiss, especially because the defendants in this hypothesized antitrust action would not be protected by the heightened pleading standards that Congress made applicable to private securities claims in the Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, § 101(b), 109 Stat. 737, 746-747, codified at 15 U.S.C. § 78u-4(b). Accordingly, plaintiffs might then be permitted discovery, and Underwriter Defendant, now likely facing a certified class in addition to the possibility of trebled damages for conduct close to the securities-regulation line, would be under enormous pressure to settle. See *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463, 476 (1978). And, if the case proceeded through discovery, the distinctions at issue are sufficiently nuanced that plaintiffs' counsel might even be able to defeat summary judgment, at which point the pressure to settle a trebled claim would be even greater.

Under the rule adopted by the panel below, then, *amici*'s members could avoid being subjected to this kind of litigation only by steering wide and clear of any conduct, even beneficial dealings growing out of "legitimate customer relationships," Amendments to Regulation M, 69 Fed. Reg. at 75785, that at the pleading stage could be labeled a violation of SEC rules and that on summary judgment could generate an issue of fact.

To take another example, the SEC (as discussed above, see page 10, *supra*) permits an IPO underwriter to "inquir[e] as to a customer's desired future position in the longer term * * *, and the price or prices at which the customer might accumulate that position without reference to immediate aftermarket

activity." Guidance Regarding Prohibited Conduct, 70 Fed. Reg. at 19676. And a customer can certainly offer up his longer-term interests of his own accord. What is not permitted is to "communicat[e] to customers that expressing an interest in buying shares in the immediate aftermarket * * * would help them obtain allocations of hot IPOs." *Id.* at 19675.

Again, if the antitrust immunity line is precisely co-extensive with the securities rules, a plaintiffs' attorney unfettered by the heightened pleading requirements applicable to securities fraud claims may be able to draft an antitrust complaint based on conversations that were close to, but in fact fell on the permitted side of, the line. For *amici*'s members, the rational response would be to avoid or at least drastically limit discussions about intentions following the IPO.

This chilling effect and distortion of incentives, moreover, is no less applicable to communications *among* underwriters. In the course of mounting their "indiscriminate," "theater-wide attack on the syndicate system," Pet. App. 86a, 91a, the plaintiffs accuse the banks of having "frequent communications among themselves * * * about IPOs, Class Securities, their division of revenues, the aftermarket prices of Class Securities, the anticompetitive charges and tie-purchases alleged herein and related matters." Consol. Compl. ¶ 51; see also *id.* ¶¶ 55-56. That is, the sharing of information within syndicates is an essential premise of the Sherman Act claims here.

It is ludicrous to suggest that communications within a syndicate, without more, violate the antitrust laws. Syndicates by their very nature entail ample communication about tactics and allocations, and even the court of appeals recognized that the syndicate system is "a prominent feature of the modern underwriting industry," Pet. App. 5a-6a. But, if the concerted action so integral to syndicates can furnish a predicate for Sherman Act claims based on the types of techniques alleged here, then underwriters will be just as concerned about the potential antitrust implications of their conversations with one another as they will about their conversations with their customers.

D. It follows that the United States' suggestion in its certiorari-stage brief (at 8) that plaintiffs "be required to re-plead to make clear that they are not relying on protected activities," is misplaced. It would be a simple enough matter for a plaintiffs' lawyer to tailor the semantics of his antitrust allegations to the SEC's regulatory proscriptions and thereby (if the United States' suggestion is adopted) avoid dismissal on immunity grounds. But that would still result in the precise circumstance that antitrust immunity in this context is designed to avoid, namely the disruption of a carefully calibrated scheme and concomitant distortion of incentives. Re-pleading would therefore be pointless; the appropriate disposition here is dismissal with prejudice.

IV. An Affirmance Would Interfere With The Objectives Of Securities Regulation and Damage the Competitiveness of U.S. Markets

The IPO process is one of the linchpins of the private economy. It is by "going public" that American enterprises secure financing for major expansion, position themselves to obtain more capital and at lower cost in the future, create liquidity and therefore heightened value for their equity, attract and provide incentives to qualified employees, and enhance their visibility and prestige. An affirmance would interfere with these objectives and thus with the SEC's mandate to promote the formation of capital. Relatedly, an affirmance would disadvantage U.S. capital markets in relation to their international competitors.

The decision below subjects *amici*'s members to the potential for enormous exposure. The plaintiffs in this case are seeking damages for drops in market value associated with at least 850 initial public offerings from 1997 to 2001. See Consol. Compl. Ex. A; Pfeiffer Compl. ¶ 4. The plaintiffs may claim that their damages run into the hundreds of billions of dollars—and that is before trebling. See SECURITIES INDUSTRY FACT BOOK 2002, at 10 (2002), *available at* http://www.sia.com/research/pdf/2002Fact_Book.pdf (IPOs raised $76.1 billion in 2000 alone). Moreover, as with securities class

actions, there will be nothing to prevent any class actions against underwriters following future market declines for alleged antitrust violations in connection with syndicate activities before the decline. If these complaints are sustained, then, the banks could become *de facto* insurers against market drops.

That would be a problem for the whole economy, not just the Wall Street firms. The possibility that conduct and communications in connection with IPOs could give rise to antitrust liability would make participation in a syndicate less attractive for potential underwriters. Syndicates would thus become rarer or smaller and in any event more costly—both because of the increased risk of liability and because each member of a smaller syndicate would be risking a greater share of capital in connection with the offering—with the ultimate result that underwriters would charge the issuer a higher risk premium. In other words, the cost of capital to businesses seeking financing would increase, which means, among other things, that some IPOs that otherwise would have occurred will not take place at all, because they will be too expensive for the issuer.

Relatedly, book-building would become more difficult, and again this would be to the detriment not just of the securities industry, but also of businesses seeking capital. One of the purposes of a syndicate is to distribute shares more widely. See, *e.g.*, *Institutional Investor Study Report of the SEC*, H.R. Doc. No. 92-64, Pt. 5, at 2393, 2520 (1971). If overdeterrence makes syndicates smaller and rarer, then we can expect shares to be distributed to fewer investors. At the same time, as discussed above, underwriters will be inhibited from having useful conversations about the offering, which means they are likely to allocate shares only to their most trusted clients. Even with those clients, the banks may be chilled from getting good information about investor interest. Accordingly, pricing will be less efficient, and demand for an offering will be lower, which means that valuations will be less favorable to the issuer. See COMMITTEE ON CAPITAL MARKETS REGULATION, INTERIM REPORT 49 (Nov. 30, 2006), *available at* http://www.

capmktsreg.org/research.html (noting that "extensive book building" of the kind practiced in the United States "helps improve the price at which a stock is sold"). Some of the end results, again, are that financing will become more difficult, and offerings that otherwise would have occurred simply will not take place. The brunt of this effect, moreover, would be borne most directly by potential IPO issuers, which for the most part are smaller companies seeking financing and positioning for increased growth.

Another possibility, especially for foreign corporations, is that the issuer *will* proceed with its IPO, but that it will list its shares on a foreign exchange instead of in this country. "A leading indicator of the competitiveness of U.S. public equity markets is the ability of the U.S. market to attract listings of foreign companies engaging in initial public offerings." INTERIM REPORT, *supra*, at 29-30. Companies choose where to list based in part on where they believe they will get the best value, and that is a function of the cost of capital and any risks particular to specific markets. *Id.* at 4. If, for reasons related to underwriter incentives, the cost of capital increases in the United States' capital markets—markets that until recently have been more favorable than their foreign counterparts from the standpoint of cost of capital, *ibid.*—an issuer may simply choose to list overseas. Similarly, if the litigation risks and regulatory burdens are perceived as too great in the United States, an issuer will go elsewhere.

These concerns are not hypothetical. Recent years have seen companies choosing to list overseas in ever-larger numbers. In 2000, fifty percent of the dollars raised in global IPOs—that is, initial public equity offerings in a market other than the company's domestic market—were raised in the United States. By 2005 that number was down to five percent. INTERIM REPORT, *supra*, at 29. See also Paul Atkins, *A Serious Threat to Our Capital Markets*, WALL. ST. J., June 10, 2006, at A12 (SEC commissioner warning that litigation is driving IPOs overseas).

A major reason for this migration is the burdens of regulation and securities class actions in the United States. "As average settlement values climb, so too do the incentives for companies to try to evade private litigation under the U.S. securities laws by simply choosing to sell their shares elsewhere." INTERIM REPORT, *supra*, at 77; see also *id.* at 39, 45-48, 71-76; Michelle Tsai & Lynn Cowan, *Chinese IPOs Stick Close to Home*, WALL ST. J., Mar. 20, 2006, at C4 (noting that Chinese companies tend to list in Hong Kong rather than the United States, in part because "[t]he U.S. requirements are considered more onerous, and the threat of investor litigation higher"); Craig Karmin & Aaron Lucchetti, *New York Loses Edge in Snagging Foreign Listings*, WALL ST. J., Jan. 26, 2006, at C1 (reporting that the 2002 Sarbanes-Oxley legislation partially accounts for the shift of capital-raising activities to overseas markets). This trend will only be exacerbated if the threat of antitrust litigation increases the costliness of IPOs done in the United States. And the impact of companies' decisions to list overseas includes not just the concrete loss to the American economy of many billions of dollars in underwriting fees and trading revenues, see INTERIM REPORT, *supra*, at 34, but loss of prestige and other intangible consequences.

When all is said and done, then, an affirmance would enrich the plaintiffs' bar at the expense not just of the petitioners, but of smaller businesses, capital formation, and the competitiveness of the American capital markets. That result cannot be consistent with Congress' intent. Indeed, the same Congress that explicitly directed the SEC to balance competition against other factors, see NSMIA, 110 Stat. at 3424-3425, enacted the Private Securities Litigation Reform Act of 1995, which was motivated by concerns that "nuisance filings, targeting of deep-pocket defendants, * * * and 'manipulation by class action lawyers of the clients whom they purportedly represent' had become rampant in recent years." *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Dabit*, 126 S. Ct. 1503, 1510-1511 (2006). This case is little more than a variation on that theme.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

ROY T. ENGLERT, JR.*
GARY A. ORSECK
DANIEL R. WALFISH
Robbins, Russell, Englert, Orseck & Untereiner LLP
1801 K Street, N.W. Suite 411
Washington, D.C. 20006
(202) 775-4500

ROBIN S. CONRAD
AMAR D. SARWAL
National Chamber Litigation Center, Inc.
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337

ROBERT H. BORK
6520 Ridge Street
McLean, VA 22101
(703) 288-1174

MARJORIE E. GROSS
Securities Industry and Financial Markets Association
360 Madison Avenue
New York, NY 10017
(646) 637-9204

MARIA GHAZAL
The Business Roundtable
1717 Rhode Island Avenue, N.W.
Suite 800
Washington, D.C. 20036
(202) 872-1260

* *Counsel of Record*

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In the Supreme Court of the United States

CREDIT SUISSE FIRST BOSTON LTD., ET AL.,

Petitioners,

v.

GLEN BILLING, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

MOTION FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE* AND BRIEF OF THE SECURITIES INDUSTRY ASSOCIATION, THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, AND THE BOND MARKET ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

ROBIN S. CONRAD
AMAR D. SARWAL
National Chamber Litigation Center, Inc.
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337

ROY T. ENGLERT, JR.*
GARY A. ORSECK
DANIEL R. WALFISH
MATTHEW R. SEGAL
Robbins, Russell, Englert, Orseck & Untereiner LLP
1801 K Street, N.W.
Suite 411
Washington, D.C. 20006
(202) 775-4500

MARJORIE E. GROSS
The Bond Market Association
360 Madison Avenue
New York, NY 10017
(646)637-9204

GEORGE R. KRAMER
Securities Industry Association
1425 K Street, N.W.
Washington, D.C. 20005
(202)216-2000

* *Counsel of Record*

MOTION FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE*

Under Rule 37.2 of the Rules of this Court, the Securities Industry Association, the Chamber of Commerce of the United States of America ("Chamber"), and The Bond Market Association move for leave to file the accompanying brief as *amici curiae* in support of the petition for a writ of certiorari. Counsel for petitioners has consented to the filing of this brief, but counsel for respondents has withheld consent.

The Securities Industry Association ("SIA") advances the common interests of approximately 600 securities firms. Its primary mission is to build and maintain public trust and confidence in the securities markets. SIA's members include investment banks, broker-dealers, and mutual fund companies, and they are active in all U.S. and foreign markets and in all aspects of corporate and public finance.

The Chamber, a nonprofit corporation organized under the laws of the District of Columbia, is the world's largest business federation. The Chamber's underlying membership includes more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of vital concern to the nation's business community.

The Bond Market Association ("BMA") represents approximately 200 securities firms, banks, and asset managers that underwrite, trade, and invest in debt securities in the United States and abroad. BMA works with its member firms, Congress, the SEC, the Federal Reserve Board, the Federal Reserve Bank of New York, state regulators, and self-regulatory organizations to enhance the liquidity and efficiency of the bond markets. BMA's membership includes all primary dealers in U.S. government securities and all major dealers in U.S. agency securities, mortgage- and asset-backed securities, corporate

bonds and money market and funding instruments, as well as asset managers with $9 trillion in assets under management.

Amici have a vital interest in this case and are well situated to brief the Court on its implications. The Second Circuit panel held that certain practices relating to initial public offerings—practices that are heavily regulated by the SEC and in large part have been approved by it—could be the basis of lawsuits in antitrust. The judgment flies in the face not just of the SEC's energetic objections, but this Court's precedents on implied immunity. If the decision stands, *amici*'s members will face the prospect of massive liability for longstanding practices that promote the formation of capital. Accordingly, *amici*'s members will be deterred from a wide range of activities that the financial community has found useful and the SEC has deemed permissible in the public interest.

Amici therefore propose to give the Court guidance on matters that are especially within their expertise. *Amici* seek to explain the value and importance to the capital markets of practices that, considered in a vacuum, might seem anti-competitive. It is for good reason that Congress did not direct, and the SEC does not seek, the unqualified promotion of short-run competition above all other policy goals. *Amici* also are well positioned to advise the Court on the likely consequences for *amici*'s members—and ultimately the capital-raising process—of the regime adopted by the Second Circuit. The Chamber, for example, brings the perspective of *issuers* of securities, including corporations going public—a constituency that is affected by this case but is otherwise unrepresented in it.

For the foregoing reasons, SIA, the Chamber, and BMA should be granted leave to file the attached brief.

Respectfully submitted.

ROBIN S. CONRAD
AMAR D. SARWAL
National Chamber Litigation Center, Inc.
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337

ROY T. ENGLERT, JR.
Counsel of Record
GARY A. ORSECK
DANIEL R. WALFISH
MATTHEW R. SEGAL
Robbins, Russell, Englert, Orseck & Untereiner LLP
1801 K Street, N.W.
Suite 411
Washington, D.C. 20006
(202) 775-4500

MARJORIE E. GROSS
The Bond Market Association
360 Madison Avenue
New York, NY 10017
(646)637-9204

GEORGE R. KRAMER
Securities Industry Association
1425 K Street, N.W.
Washington, D.C. 20005
(202)216-2000

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TABLE OF AUTHORITIES

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CASES

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Gilliard v. *Mississippi*, 464 U.S. 867 (1983) 20

Gordon v. *New York Stock Exchange, Inc.*, 422 U.S. 659 (1975) 11, 12, 15

In re Global Crossing, Ltd. Sec. Litig., 322 F. Supp. 2d 319 (S.D.N.Y. 2004) 19

In re IPO Antitrust Litig., 287 F. Supp. 2d 497 (S.D.N.Y. 2003) 19

In re IPO Sec. Litig., 241 F. Supp. 2d 281 (S.D.N.Y. 2003) 19

In re Merrill Lynch & Co. Research Reports Sec. Litig., 273 F. Supp. 2d 351 (S.D.N.Y. 2003) 19

In re Public Offering Fee Antitrust Litig., No. 98 Civ. 7890 (LMM), 2001 WL 128321 (S.D.N.Y. Feb. 14, 2001), *vacated*, 52 Fed. App. 548 (2d Cir. 2002). 5, 19

In re Worldcom, Inc. Sec. Litig., 294 F. Supp. 2d 392 (S.D.N.Y. 2003) 19

Merrill Lynch, Pierce, Fenner & Smith, Inc. v. *Dabit*, 74 U.S.L.W. 4167 (U.S. Mar. 21, 2006) 18

TABLE OF AUTHORITIES—Continued

Page(s)

Nat'l Soc'y of Prof'l Eng'rs v. *United States*, 435 U.S. 679 (1978) 9

Phonetele, Inc. v. *AT&T Co.*, 664 F.2d 716 (9th Cir. 1981) 14

Silver v. *New York Stock Exchange, Inc.*, 373 U.S. 341 (1963) 12, 20

Texas Indus., Inc. v. *Radcliff Materials, Inc.*, 451 U.S. 630 (1981) 16

United States v. *Nat'l Ass'n of Sec. Dealers, Inc.*, 422 U.S. 694 (1975) 12

Verizon Communications Inc. v. *Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004) 11-13

STATUTES

15 U.S.C. § 77b(b) 3

15 U.S.C. § 78c(f) 3

28 U.S.C. § 1291 20

National Securities Markets Improvement Act of 1996, Pub. L. No. 104-290, § 106, 110 Stat. 3416 (1996) 18

Private Securities Litigation Reform Act of 1995 ("PSLRA"), Pub. L. No. 104-67, 109 Stat. 737 (1995) 18

TABLE OF AUTHORITIES—Continued

Page(s)

REGULATIONS

17 C.F.R. §§ 242.100 – .105 (2005) 13

OTHER AUTHORITIES

2 Areeda, Phillip E. et al., Antitrust Law (2d ed. 2000) .. 14

Carter, Richard B. & Frederick H. Dark, *Underwriter Reputation and IPOs: The Detrimental Effect of Flippers*, 28 Fin. Rev. 279 (1993) 8

Commission Guidance Regarding Prohibited Conduct in Connection with IPO Allocations, SEC Release No. 33-8565, 70 Fed. Reg. 19,672 (Apr. 13, 2005) 7, 13, 14

Crocker, Bruce E., *The Initial Public Offering Process*, 955 PLI/Corp 385 (1996). 3, 5-7, 17

Easterbrook, Frank H., *The Limits of Antitrust*, 63 TEX. L. REV. 1 (1984) 14

Federal Trade Commission & U.S. Department of Justice, Antitrust Guidelines for Collaborations Among Competitors (2000), *available at* http://www.ftc.gov/os/2000/04/ftcdojguidelines.pdf 6, 14

Hovenkamp, Herbert, *Antitrust Violations in Securities Markets*, 28 J. Corp. L. 607 (2003) 3, 4, 10

Hovenkamp, Herbert, The Antitrust Enterprise (2005) ... 13

TABLE OF AUTHORITIES—Continued

Page(s)

Institutional Investor Study Report of the SEC, H.R. Doc. No. 92-64, Pt. 5 (1971) 5, 6

Karmin, Craig & Aaron Lucchetti, *New York Loses Edge in Snagging Foreign Listings*, Wall St. J., at C1 (Jan. 26, 2006) 18

Loss, Louis & Joel Seligman, Fundamentals of Securities Regulation (4th ed. 2004) 5-8, 10

SEC Release No. 34-2446, 1940 WL 968 (Mar. 18, 1940) . 9, 10

SEC, *Allocation of New Issues of Securities*, 1994 WL 744595 (Oct. 18, 1994) 8

SEC, *IPOs: Why Individuals Have Difficulty Getting Shares*, *at* http://www.sec.gov/answers/ipodiff.htm 8, 9

SEC, *Report of Special Study of Securities Markets*, H.R. Doc. No. 88-95, Pt. 1 (1963) 8, 9

Securities Industry Fact Book 2002 (SIA 2002), *available at* http://www.sia.com/research/pdf/2002Fact_Book.pdf ... 16

Tsai, Michelle & Lynn Cowan, *Chinese IPOs Stick Close to Home*, Wall St. J., at C4 (Mar. 20, 2006) 18

BRIEF OF *AMICI CURIAE* IN SUPPORT OF PETITIONERS

INTEREST OF THE *AMICI CURIAE*[1]

The interest of the *amici curiae* is described in the accompanying motion for leave to file this brief.

SUMMARY OF ARGUMENT

The complaints sustained by the Second Circuit panel for the most part describe practices that have been standard techniques for raising capital for the better part of a century, and are expressly permitted by the SEC. The collaborative nature of an underwriting syndicate, and the interactions between underwriters and potential purchasers of initial public offering ("IPO") shares, might be suitable subjects of scrutiny if antitrust policies were all that mattered. Antitrust policies, however, are not all that matters. The SEC is expressly charged with balancing competition against other policies, including the formation of capital. Most of the practices that the plaintiffs depict as sinister collusion are in fact designed to facilitate the accumulation of capital and stabilize the market for the shares of a newly public company at an especially vulnerable time in its life cycle.

Although the complaints contain allegations of practices that may not be permitted under the securities regulations, the immunity analysis is not supposed to proceed by asking, as to each and every allegation at the pleading stage, whether the conduct in question is prohibited or permitted under the securities laws. On the contrary, in this area of fine and subtle distinctions drawn by the regulator, the immunity boundary must be broader than the boundaries drawn by the regulatory regime, or the very purpose of the immunity doctrine—to leave room for

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[1] Under Rule 37.6 of the Rules of this Court, *amici curiae* state that no counsel for a party has written this brief in whole or in part and that no person or entity, other than the *amici curiae*, their members, or their counsel, has made a monetary contribution to the preparation and submission of this brief.

the regulatory regime to function as Congress and the SEC intend—would be thwarted.

If allowed to stand, the rule adopted by the panel below will disrupt the process of raising capital by over-deterring useful activities. Financial institutions will steer well clear of anything that could give rise to suspicions of antitrust violations—which create the potential for liability for treble damages and attorneys' fees—even if the result is to chill productive business arrangements. Underwriters will be discouraged from joining syndicates or insist on a higher premium to do so, and shares will not be distributed as widely or generate as much demand. The result is that many IPOs either will not occur or will be more expensive to the issuer, and the SEC's mandate to promote the formation of capital will be undermined.

Finally, if review is not granted in this case, the Court will likely not have another opportunity to rectify the problems created by the decision below. If the panel decision stands, every district judge in the Second Circuit—which is where cases of this nature frequently are brought, and in the future certainly will be brought—will be bound by it. The district judges will inevitably deny motions to dismiss on immunity grounds, and those decisions will not be appealable because they will not be final. Rational underwriters will then settle early on rather than proceed with a trial in hopes of eventually convincing the Second Circuit or this Court to reverse the rule adopted below. The issue therefore will be effectively shielded from review by this Court, even as the problems created by the decision below become a reality.

ARGUMENT

I. The Decision Below Sustains An Indiscriminate Attack On Long-standing Techniques For Raising Capital That Are Carefully Regulated To Balance Competition Against Other Essential Objectives

A. The plaintiffs have launched, and the Second Circuit has permitted, a frontal assault on one of the linchpins of the

private economy. It is through an initial public offering that American enterprises secure financing for major expansion, position themselves to obtain more capital and at lower cost in the future, create liquidity and therefore heightened value for their equity, attract and provide incentives to qualified employees, and enhance their visibility and prestige. See, *e.g.*, Bruce E. Crocker, *The Initial Public Offering Process*, 955 PLI/Corp 385, 387 (1996).[2] All but the smallest IPOs are conducted through an "underwriting syndicate," a group of investment banks that assume the risks associated with an offering and perform other services—most notably building a book of purchasers—in an effort to make the offering a success.

In order to make out the conspiracy element of their Sherman Act claim, the plaintiffs rely on allegations that—after the inflammatory tone and the conclusory accusations of unlawful conduct are, as the district court put it, "centrifuged" away, Pet. App. 86a—describe practices that have been accepted in corporate finance for a century.

These practices may not always maximize short-run competitiveness (although even that is far from certain[3]), but they do not necessarily have to. Congress, after careful study, has charged the SEC with balancing a number of policy objectives, including competition but also including the formation of capital. See 15 U.S.C. § 77b(b); 15 U.S.C. § 78c(f).

These goals are not always in harmony. As a leading antitrust scholar has explained:

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[2] American firms raise capital as well through public offerings of debt and of equity subsequent to the IPO. Such offerings frequently use the same syndication techniques targeted by plaintiffs. The effect of the panel's decision therefore will not be limited to IPOs but will extend to many other securities offerings.

[3] See Herbert Hovenkamp, *Antitrust Violations in Securities Markets*, 28 J. Corp. L. 607, 610-628 (2003).

> [Antitrust's] goals are much narrower than those of the [SEC], which is certainly concerned with the competitiveness of securities markets, but also with *the viability of sellers*, with the truthfulness of information, with sharp practices that may injure customers, and with *the smooth functioning of trading institutions*.
>
> *For the SEC these various goals may sometimes be in conflict and must be balanced against each other. By contrast, antitrust is myopic, and is concerned only with preserving competitive markets in the short run.*

Herbert Hovenkamp, *Antitrust Violations in Securities Markets*, 28 J. Corp. L. 607, 609 (2003) (emphasis added); see also *id.* at 633 (noting that "the regulatory process is often concerned with more [than antitrust], including the vitality of the markets . . . and even the economic health of regulated firms").

It is because of this tension that the plaintiffs' lawyers here can look at techniques like syndicated underwritings and the allocation of shares to long-term investors rather than short-term speculators, and see only anti-competitive conduct, while actors in the real-world financial community—along with the SEC—understand that these are time-tested ways of financing young companies and stabilizing the price of their shares at an especially vulnerable time in their life cycle.

B. 1. The plaintiffs, for example, attack the formation of underwriting syndicates. They allege that defendants "regularly combined with one another during the Class Period into underwriting syndicates," that they agreed "that whichever of them was lead underwriter in a particular syndicate could itself distribute all the shares of each Class Security," and that "[a]ny member of the syndicate who did not sell the number of shares allocated to it . . . nevertheless shared in the underwriters' discount." Consol. Compl. ¶¶ 38-39.

That, however—as the SEC pointed out below, Pet. App. 153a-155a, and as even the Assistant Attorney General for Antitrust acknowledged, see Pet. App. 177a—does nothing more

than describe an accepted system for distributing new security issues. Since the early twentieth century, it has been common practice for a group of financial institutions—a syndicate headed by a single bank (the "lead" or "managing" underwriter)—to purchase a set number of shares from the issuing company and then resell them to the public at a fixed price. See Louis Loss & Joel Seligman, Fundamentals of Securities Regulation 76-85 (4th ed. 2004). The banks perform a number of crucial functions in the offering process. First of all, they are experts in the valuation and distribution of new securities, and therefore can guide the company through the offering process. Relatedly, the banks are in a position to publicize the offering among investors and to assemble purchasers in order to make the offering a success. Crocker, *supra*, at 391-392.

Finally, it is the banks that make the offering economically attractive by assuming from the issuer the risks that the offering will fail—in other words, that the shares will not be sold because the public is not interested or the price is too high. The nature of an equity offering is that the issuer agrees to part with a pre-determined percentage of its equity in exchange for a pre-determined amount of capital. The bank in essence guarantees (hence, underwrites) that the issuer will receive that amount of capital and assumes, in exchange for a premium, the risk that the offer will fail. See, *e.g.*, *Institutional Investor Study Report of the SEC*, H.R. Doc. No. 92-64, Pt. 5, at 2511 (1971) ("*Institutional Investor Study*"); Loss & Seligman, *supra*, at 83. The banks' compensation also includes a management fee, which reflects their services in connection with the offering, as well as their expertise and reputation, on which the success of the offering depends. See *In re Public Offering Fee Antitrust Litig.*, No. 98 Civ. 7890 (LMM), 2001 WL 128321, at *8 (S.D.N.Y. Feb. 14, 2001), *vacated*, 52 Fed. App. 548 (2d Cir. 2002); *Institutional Investor Study*, at 2519.

The reasons why banks form syndicates, rather than just manage IPOs individually, are to share the risk and, frequently, to obtain an optimal distribution and public profile for the stock.

Crocker, *supra*, at 392; *Institutional Investor Study*, at 2520.The SEC and the National Association of Securities Dealers, which is subject to SEC oversight, comprehensively and pervasively regulate syndicates and communications among their members, see Pet. App. 87a-89a (reviewing authorities), and permit much of the conduct described in the complaint. For instance, to return to the allegations quoted above, it is perfectly normal for a lead underwriter to distribute an entire offering while other syndicate members are still compensated for having assumed risk in connection with the offering. See Pet. App. 154a; Loss & Seligman, *supra*, at 81.

Antitrust law ultimately permits many competitor collaborations, but it often requires case-specific scrutiny of "the extent to which the participants and the collaboration have the ability and incentive to compete independently." Federal Trade Commission & U.S. Department of Justice, Antitrust Guidelines for Collaborations Among Competitors § 3.3 (2000), *available at* http://www.ftc.gov/os/2000/04/ftcdojguidelines.pdf ("Competitor Collaboration Guidelines"). "[B]y limiting independent decision making or combining control over . . . competitively sensible variables, an agreement may create or increase market power . . . ." *Id.* § 3.31. Thus, applying antitrust law to the formation and workings of syndicates threatens to substitute one-by-one assessments of the competitive alternatives to each arrangement for the generic determination by the SEC and the regulated industry that this manner of doing business is sensible, efficient, and in the public interest. Requiring each syndicate to justify its existence and operation, starting from scratch, would create a certain drag on the economy and on capital formation.

2. The plaintiffs also train their fire on the standard methods of generating interest in a new offering, assessing investor demand for it, and allocating the initial distribution. The plaintiffs accuse the defendants, for example, of:

> host[ing] "road shows" during which customers were introduced to the issuer and its managers and during which the offering was described. Defendants also conducted

> telephone calls, meetings and other regular communications prior to the IPOs of Class Securities. During, or as part of these communications, including communications separate and apart from the "road shows," defendants, at times jointly, made inquiries of customers or others interested in purchasing Class Securities concerning the number of shares that such person would be willing to purchase in the aftermarket and the prices such person would be willing to pay for such shares.

Consol. Compl. ¶ 54. But all of these activities are recognized components of the IPO process. After the decision to go public has been made, the lead underwriter arranges the company's "road show," a series of meetings that executives of the company and representatives of the underwriters hold with investors across the country and sometimes overseas in order to generate demand for the new offering. See, *e.g.*, Loss & Seligman, *supra*, at 83; Crocker, *supra*, at 396.

At the same time, the underwriters need to gather information on investor demand so they can properly price and size the issue and "build a book" for it. The underwriters collect non-binding "indications of interest" regarding how many shares and at what prices investors would purchase them both in the offering and in the aftermarket. The underwriter's goal is to build a book of orders that greatly exceeds the size of the offering, because then the underwriter can be selective about who will receive shares and make optimal allocation decisions. Crocker, *supra*, at 396; Commission Guidance Regarding Prohibited Conduct in Connection with IPO Allocations, SEC Release No. 33-8565, 70 Fed. Reg. 19,672, 19,674-75 (Apr. 13, 2005) ("Prohibited Conduct Release").

The plaintiffs, however, want to characterize the book-building process as a broad conspiracy, designed only to enrich underwriters and their favored clients at the expense of the public (Pfeiffer Compl. ¶¶ 69-70):

> During the relevant period, the Underwriter Defendants kept careful records showing the trading activity of all their broker-dealer clients and categorized these clients according to the length of time they would hold securities allocated to them . . . .
>
> [S]ecurities in "hot issue IPOs" were sold only to those customers who satisfied the retention criteria for their allocations.

But the "*J'Accuse!*" here rings hollow. In any IPO, the issuer and the bank want to allocate blocks of shares to more desirable customers—ones who are likely to hold the investment for a period of time, rather than quickly sell, or "flip," them for a short-term speculative profit. *E.g.*, SEC, *Report of Special Study of Securities Markets*, H.R. Doc. No. 88-95, Pt. 1, at 523 (1963) ("*Report of Special Study*"). "Flipping" increases volatility and may depress the price, to the detriment of both underwriter and issuer. See, *e.g.*, Richard B. Carter & Frederick H. Dark, *Underwriter Reputation and IPOs: The Detrimental Effect of Flippers*, 28 Fin. Rev. 279, 282-283 (1993); *Friedman* v. *Salomon/Smith Barney, Inc.*, No. 98 Civ. 5990 (NRB), 2000 WL 1804719, at *2 (S.D.N.Y. Dec. 8, 2000), *aff'd*, 313 F.3d 796 (2d Cir. 2002). Accordingly, the banks, in making allocation decisions, rely on their knowledge of and relationships with institutional investors, broker-dealer intermediaries who themselves have relationships with preferred customers, and the indications of interest received during and after the road show. See Loss & Seligman, *supra*, at 80-81; SEC, *IPOs: Why Individuals Have Difficulty Getting Shares*, *at* http://www.sec.gov/answers/ipodiff.htm ("*Difficulty Getting Shares*"). In any event, an underwriter "is free to distribute its allotment of new securities as it sees fit among its customers." See, *e.g.*, SEC, *Allocation of New Issues of Securities*, 1994 WL 744595 (Oct. 18, 1994).

Policies to combat flipping are plainly in the public interest, and the SEC's supervision protects against abuse. Yet, if the Sherman Act applies to those policies, the "mere" fact that they serve the public interest might well be deemed irrelevant.

"[T]he purpose of [antitrust] analysis is to form a judgment about the competitive significance of the restraint; it is not to decide whether a policy favoring competition is in the public interest . . . ." *Nat'l Soc'y of Prof'l Eng'rs* v. *United States*, 435 U.S. 679, 692 (1978). Although the policies ultimately should be upheld under the antitrust laws, see note 4, *infra*, subjecting them to a mode of analysis that ignores the public interest makes no sense, and is not what Congress intended.

3. The plaintiffs also suggest that price-stabilization techniques are anti-competitive practices that warrant treble damages (Pfeiffer Compl. ¶¶ 78, 81):

> in order to ensure that they would receive large allocations of stock, the Institutional Defendants agreed to the terms and conditions established by the Underwriter Defendants.
>
> . . .
>
> The Institutional Defendants agreed that, in exchange for the large IPO allocation, they would hold these securities for an extended period of time.

But this makes out nothing more than a restriction on "flipping." Such a restriction is a permissible technique for stabilizing the price of a new offering. See, *e.g.*, Pet. App. 190a; *Difficulty Getting Shares* ("[S]ome firms impose restrictions on investors who 'flip' or sell their IPO shares soon after the first day of trading . . . . If you flip your IPO shares, your firm may refuse to sell you other IPOs altogether or prevent you from buying an IPO for several months.").

Indeed, for sixty years or more, the SEC has recognized the importance of price stabilization and permitted various measures to achieve it. See, *e.g.*, *Friedman*, 2000 WL 1804719, at *6-*10 (reviewing history of SEC's attentive regulation of stabilizing practices); *Report of Special Study*, at 526. For example, underwriters are allowed, once trading has begun, to place bid orders at a given threshold so that sell orders meeting the bids will be absorbed and a price decline will be slowed or stopped. Moreover, underwriters sometimes have the contractu-

al right to penalize an intermediate dealer, either by canceling its concessions or its sales commissions, when shares it sold come back onto the market. The theory is that the dealer did not earn his concession if he did not "find a good home" for the shares. Loss & Seligman, *supra*, at 82, 1138; see also *Friedman*, 2000 WL 1804719, at *2, *9 (noting that SEC has permitted arrangements in which the lead underwriter may reclaim fees from a syndicate member when the securities the member sells come back onto the market).

Price stabilization may not be an especially competition-enhancing activity, at least not in the short term[4]—it is, after all, a form of market manipulation, see SEC Release No. 34-2446, 1940 WL 968, at *1 (Mar. 18, 1940)—but, as with the majority of the conduct alleged by the plaintiffs, the SEC has judged that any adverse effects on competition are more than outweighed by the stabilizing effect on the markets and the capital-forming benefits to newly public firms.

In sum, much of the complaint consists of nothing more than a description of the syndicated underwriting process that the plaintiffs have dressed up for Halloween. To hold, as the panel below has done, that such allegations can be the basis for an antitrust class action is to permit a destructive assault on a system that until now has strived to strike a delicate balance between competition and other essential policies.

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[4] But see Hovenkamp, *supra*, at 622 ("Antitrust requires an injury to competition, and not just to individual buyers. This would require a showing that overall prices are higher or output lower in some properly defined market. It is hard even to produce an argument that anti-flipping rules are anticompetitive as a general matter, even though some individual buyers who prefer to churn their shares will earn less as a result.").

II. The Purposes Of The Immunity Doctrine Are Defeated If The Immunity Analysis Is Preceded By A Fine-Grained Analysis Of The Legality Of Each Allegation Under The Securities Laws

The Assistant Attorney General for Antitrust took the position below, and the panel implicitly agreed, see Pet. App. 65a-67a, that immunity here is not appropriate because a portion of the allegations describe conduct—particularly "tie-ins" and "laddering"—prohibited by the SEC. But immunity from antitrust cannot possibly hinge on whether, as to each specific allegation, there is a literal conflict between antitrust and the securities laws.

Rather, the question must be whether the application of antitrust law to this *area of activity* would interfere with the operation of securities regulation. As the SEC explained below: "[A]s the Supreme Court indicated in *Gordon* [v. *New York Stock Exchange, Inc.*, 422 U.S. 659 (1975)], *the concern is with protecting the full scope of the regulatory regime*, and of the Commission's freedom to act, not with whether the particular conduct has been approved." Pet. App. 149a-150a (emphasis added). The line of immunity cannot precisely trace the line separating permissible and impermissible conduct under the securities laws. On the contrary, the former must give some berth to the latter, or the objectives of the immunity doctrine will be defeated.

This point is illustrated by *Verizon Communications Inc.* v. *Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004). *Trinko* concerned the question whether Verizon could be liable in antitrust for alleged anticompetitive conduct that squarely violated the Telecommunications Act of 1996 (the "1996 Act"). This Court all but said that implied immunity would have been appropriate, had Congress not explicitly reserved the applicability of the antitrust laws with a saving clause. The Court noted, in language equally applicable here (*id.* at 406):

> [A] detailed regulatory scheme such as that created by the 1996 Act ordinarily raises the question whether the regulated entities are not shielded from antitrust scrutiny altogether by the doctrine of implied immunity. See, *e.g.*, *United States* v. *National Assn. of Securities Dealers, Inc.*, 422 U.S. 694 (1975) ["*NASD*"]; *Gordon* v. *New York Stock Exchange, Inc.*, 422 U.S. 659 (1975). In some respects the enforcement scheme set up by the 1996 Act is a good candidate for implication of antitrust immunity, to avoid the real possibility of judgments conflicting with the agency's regulatory scheme "that might be voiced by courts exercising jurisdiction under the antitrust laws." [*NASD*, 422 U.S.] at 734. Congress, however, precluded that interpretation.

The only real difference between the relevant legal context in *Trinko* and this case is the saving clause in *Trinko*, which *required* this Court to reject immunity. Here, there is an equivalently "detailed regulatory scheme," but there is no saving clause. Thus, if the panel below had approached this case the same way this Court analyzed *Trinko* only two years ago—that is to say, had the panel focused, as the SEC and the defendants urged it to do, on the existence of an agency's "regulatory scheme" with which the judgment of an antitrust court could conflict—the result would certainly have been recognition of implied immunity. Instead, the panel dismissed *Trinko* as irrelevant. See Pet. App. 41a n.36.

The Court in *Trinko*, because it could not hold that Verizon was immune from antitrust liability for the conduct there at issue, went on to consider the value of applying antitrust laws to certain kinds of allegedly anticompetitive conduct in the telecommunications industry. Its analysis on this point (which cites *Silver* v. *New York Stock Exchange, Inc.*, 373 U.S. 341 (1963) and *NASD*, see 540 U.S. at 412), is a close cousin of the immunity analysis and has illustrative value here.

The Court in *Trinko* in effect asked two questions: "First, how well is the regulatory enterprise itself doing its job of

identifying and controlling competitive harms?" and "Second, how much confidence do we have that application of the antitrust laws will improve competition in the situation at hand?" Herbert Hovenkamp, The Antitrust Enterprise 237 (2005). The Court determined that the telecommunicatons regulatory regime "was an effective steward of the antitrust function" and that the marginal additional benefits of antitrust law in the situation at hand were not worth their cost. 540 U.S. at 411-415.

Similar concerns come into play here. There is no serious suggestion that the SEC is not a vigilant and capable regulator or that it is not executing its mandate to promote competition in conjunction with other objectives. In fact, to the extent the complaint might allege actual securities-law violations, the SEC is "actively pursuing comprehensive regulatory responses." Pet. App. 127a-128a; Pet. 7. As for improving competition, in the IPO context as in *Trinko*, "[t]he cost of false positives counsels against an undue expansion" of antitrust liability. *Trinko*, 540 U.S. at 414. False positives—the cost of which, as discussed below, include over-deterrence and a concomitant increase in the cost of capital—are especially likely in the IPO context because of the SEC's careful line-drawing.

The SEC has long used its expert knowledge of the securities markets to draw fine distinctions between permissible and impermissible conduct in an effort to balance the promotion of competition against other objectives. To take just one example, the SEC has determined that if, during the book-building process, a sales representative "[s]olicit[s] customers prior to the completion of the distribution regarding whether and at what price and in what quantity they intend to place immediate aftermarket orders for IPO stock," the representative has violated Regulation M,[5] which prohibits inducing bids and purchases before the end of the distribution. Prohibited Conduct Release, *supra*, at 19,675. By contrast, the closely related act of

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[5] 17 C.F.R. §§ 242.100 – .105 (2005).

"inquiring as to a customer's desired future position in the longer term (for example, three to six months), and the price or prices at which the customer might accumulate that position without reference to immediate aftermarket activity" is allowed. *Id.* at 19,676.

The subtleties of distinctions like this one are not likely to be appreciated by a lay jury applying an amorphous rule of reason in antitrust. The SEC's carefully calibrated regime would, in effect, be replaced by the blunt and sometimes unpredictable instrument of antitrust.[6] And yet, the entire point of the immunity doctrine in the securities context is to give the SEC room to do its job.

That is why it is no answer to say that, even if immunity is denied, it is no big deal because an antitrust court can take into account the existence of the SEC's regulatory scheme. See Pet. App. 58a-60a. The reality is that these decisions are frequently made by juries, not courts. Indeed, the panel below quotes the decision of then-Circuit Judge Kennedy in *Phonetele, Inc.* v. *AT&T Co.*, 664 F.2d 716 (9th Cir. 1981): "While a given regulatory scheme may not amount to the degree of necessity required to confer implied immunity on all activities of a regulated entity, some degree of necessity may be *established as a matter of fact in individual cases*." *Id.* at 737 (emphasis added). But "matters of fact in individual cases" in our legal system are determined by juries, not judges. See also 2 Phillip E. Areeda et al., Antitrust Law ¶ 306, at 57 (2d ed. 2000) (noting that "many counsel and judges leave the jury to apply an unelaborated legal standard," even if that is not correct

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[6] See Frank H. Easterbrook, *The Limits of Antitrust*, 63 Tex. L. Rev. 1, 12 (1984) ("When everything is relevant, nothing is dispositive. . . . The formulation offers no help to businesses planning their conduct. Faced with a list of such imponderables, lawyers must engage in ceaseless discovery."). See also Competitor Collaboration Guidelines § 3.3 ("Rule of reason analysis entails a flexible inquiry and varies in focus and detail depending on the nature of the agreement and market circumstances. . . . Ordinarily, . . . no one factor is dispositive in the analysis.").

practice). Perhaps judges may be able wisely to take stock of the activities of a regulator to determine whether it is promoting competition and doing so in the correct measure—although even that inquiry will yield unpredictable results—but it is certain that juries can do no such thing. Accordingly, it will be impossible to counsel clients to do anything other than steer well clear of the legal lines.

For all of these reasons, the Second Circuit panel approached the issue from the wrong direction when it assessed the antitrust immunity of the plaintiffs' pleading-stage allegations only after examining them through the high-resolution microscope of the securities laws. The first question has to be not whether the securities laws do or do not allow each particular allegation, but rather whether the entire scheme of securities regulation in this area will be disrupted if it must constantly edge right up against antitrust. As this Court has explained, in circumstances analogous to the present ones (*Gordon*, 422 U.S. at 688):

> We believe that the United States, as amicus, has confused two questions. On the one hand, there is a factual question as to whether fixed commission rates are actually necessary to the operation of the exchanges as contemplated under the Securities Exchange Act. On the other hand, there is a legal question as to whether allowance of an antitrust suit would conflict with the operation of the regulatory scheme which specifically authorizes the SEC to oversee the fixing of commission rates. The factual question is not before us in this case. Rather, we are concerned with whether antitrust immunity, as a matter of law, must be implied in order to permit the Exchange Act to function as envisioned by the Congress.

This case is similar. The Assistant Attorney General and the Second Circuit panel have focused on the later-stage questions of which conduct is permitted by which regime. Those questions leapfrog over the logically prior issue, which is whether, if antitrust immunity is not implied as a matter of law, the

securities statutes will "function as envisioned by Congress." In this case, they will not.

III. The Decision Below Will Deter Useful Conduct In The IPO Context And Therefore Interfere With The Objectives Of Securities Regulation

The decision below will subject *amici*'s members to the potential for enormous exposure. In this case, for instance, the plaintiffs are seeking damages for drops in market value associated with at least 850 initial public offerings from 1997 to 2001. See Consol. Compl. Ex. A; Pfeiffer Compl. ¶ 4. The plaintiffs may claim that their damages run into the hundreds of billions of dollars—and that is before trebling. See Securities Industry Fact Book 2002, at 10 (SIA 2002), *available at* http://www.sia.com/research/pdf/2002Fact_Book.pdf (IPOs raised $76.1 billion in 2000 alone). Moreover, as with securities class actions, there will be nothing to prevent any future class actions against underwriters for antitrust violations whenever the market declines. Under the Second Circuit's rule, many of *amici*'s members could become de facto insurers against market drops.

The result will be to disrupt the process of capital formation. The major concern of *amici*'s members from now on will no longer be maximizing value within the intricate, expertly tailored securities-regulatory regime, but rather steering wide and clear of any activity that could even remotely implicate antitrust concerns and the concomitant potential for crippling awards of treble damages and attorneys' fees. The financial community, in short, will experience what this Court has described as "the problem of 'overdeterrence,' *i.e.*, the possibility that severe antitrust penalties will chill wholly legitimate business arrangements." *Texas Indus., Inc.* v. *Radcliff Materials, Inc.*, 451 U.S. 630, 637 (1981); see also Pet. App. 193a-194a (SEC warning court below against "discouraging useful interactions among participants in the offering process" and thus "over-deter[ing] conduct that would serve the interests of the markets and the capital formation process").

The SEC starkly warned in the district court that to sustain the complaints in this case "threatens" the entire syndicate offering system because "mere participation in a syndicate could be construed to be sufficient, without more, to uphold a finding of an antitrust violation against all the participants." Pet. App. 155a. The SEC is right. What is more, the very nature of a syndicate entails activity that could raise antitrust concerns—forming agreements, fixing prices, sharing information about customers. If conduct connected to these activities has even the potential to subject the underwriters to liability for treble damages plus attorneys' fees, many underwriters simply will decline to join syndicates or will do so only for a higher fee. Syndicates will become rarer or more expensive, but either way the result will be that the underwriter or group of underwriters will demand from the issuer a higher risk premium. That is, the cost of capital to issuers will increase, which necessarily means that some IPOs that would have otherwise occurred will not take place at all, because they will be too expensive for the issuer. See, *e.g.*, Crocker, *supra*, at 388 (noting that "[i]n order to attract the interest of major investment banks and institutional investors, a company must be able to offer at least $15 million of equity in its IPO").

Another result of the rule below is that book-building will become more difficult. Recall that one purpose of the syndicate is to distribute shares more widely. If overdeterrence makes syndicates smaller and rarer, then we can expect shares to be distributed to fewer investors. At the same time, the threat of antitrust liability will inhibit underwriters from having conversations about the IPO with, and therefore allocating shares to, anyone but their most trusted clients. Even with those clients, the chill produced by the decision below may deter the banks from getting good information about investor interest. Accordingly, demand for an offering will be lower and valuations will be less favorable. The end result is again that

IPOs will become more expensive, and many that would have otherwise occurred will simply not take place.[7]

When all is said and done, then, the result of the decision below will be a net transfer of wealth from companies going public to class-action plaintiffs and their lawyers. This result, which undermines the SEC's statutory mandate to promote the formation of capital, cannot be what Congress intended.

Indeed, the same Congress that expressly directed the SEC to balance competition against other factors—see National Securities Markets Improvement Act of 1996, Pub. L. No. 104-290, § 106, 110 Stat. 3416, 3424-3425 (1996)—enacted the Private Securities Litigation Reform Act of 1995 ("PSLRA"), Pub. L. No. 104-67, 109 Stat. 737 (1995). As this Court recently observed, the PSLRA was motivated by a concern that "nuisance filings, targeting of deep-pocket defendants, . . . and 'manipulation by class action lawyers of the clients whom they purportedly represent' had become rampant in recent years." *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Dabit*, 74 U.S.L.W. 4167, ___ (U.S. Mar. 21, 2006). Allowing the present lawsuits to proceed would circumvent the safeguards of the

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[7] Still another possibility, especially for a foreign corporation, is that the issuer will proceed with its IPO, but list its shares on a foreign exchange instead of in this country. The prospect of companies choosing to list overseas rather than in the United States because of heightened costs here is not merely hypothetical. See, *e.g.*, Craig Karmin & Aaron Lucchetti, *New York Loses Edge in Snagging Foreign Listings*, Wall St. J., at C1 (Jan. 26, 2006) (reporting that in 2005, 90% of the money raised in IPOs by foreign issuers came from listings outside the U.S.—whereas in 2000, 90% came from listings inside the U.S.—and that a major reason for the shift is the increased costs created by the 2002 Sarbanes-Oxley legislation); see also Michelle Tsai & Lynn Cowan, *Chinese IPOs Stick Close to Home*, Wall St. J., at C4 (Mar. 20, 2006) (noting that Chinese companies tend to list in Hong Kong rather than the U.S., in part because "[t]he U.S. requirements are considered more onerous, and the threat of investor litigation higher.").

PSLRA by repackaging what are in essence securities fraud claims, see *In re IPO Securities Litigation*, 241 F. Supp. 2d 281 (S.D.N.Y. 2003) (securities fraud suits based on the same allegations leveled here), as antitrust complaints. Congress's concerns about abusive class-action litigation would be realized, except that the economic harm would be three times greater.

IV. This Is Likely To Be The Court's Only Opportunity To Rectify The Enormous Problems Created By The Decision Below

No purpose would be served by waiting to review this issue until more courts have addressed it, because that is unlikely to happen. The Second Circuit sits in the nation's financial capital and presides over the Southern District of New York, which historically has processed a great many lawsuits alleging misdealing in connection with securities markets. Plaintiffs and the Judicial Panel on Multidistrict Litigation ("JPMDL") tend, respectively, to file in and transfer to the Southern District of New York the most complicated securities suits arising out of the highest-profile scandals and seeking the largest amounts of money.[8] Certainly the decision below gives plaintiffs' lawyers no reason to bring suits challenging securities offering practices on antitrust grounds in any other Circuit, nor is there any reason for the JPMDL to change its practice.

If the panel's decision stands, civil procedure and economics will conspire to shield the issue from this Court. Treble-damage class actions against underwriters alleging antitrust violations are certain to become a post-market-decline routine.

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[8] See generally, *e.g.*, *In re Worldcom, Inc. Sec. Litig.*, 294 F. Supp. 2d 392 (S.D.N.Y. 2003); *In re Global Crossing, Ltd. Sec. Litig.*, 322 F. Supp. 2d 319 (S.D.N.Y. 2004); *In re Merrill Lynch & Co. Research Reports Sec. Litig.*, 273 F. Supp. 2d 351 (S.D.N.Y. 2003); *In re IPO Sec. Litig.*, 241 F. Supp. 2d 281 (S.D.N.Y. 2003); *In re IPO Antitrust Litig.*, 287 F. Supp. 2d 497 (S.D.N.Y. 2003); *In re Public Offering Fee Antitrust Litig.*, No. 98 Civ. 7890 (LMM), 2001 WL 128321 (S.D.N.Y. Feb. 14, 2001).

Under the decision below, every judge in the Second Circuit will reject, at the motion-to-dismiss stage, the defense of immunity. The denials of the motions to dismiss will not be appealable because they are not final decisions. See 28 U.S.C. § 1291. Even if a different panel of the Second Circuit were inclined to revisit the holding below, it could not do so until after a trial on the merits in which judgment was granted for the plaintiffs. But no rational financial institution will wait that long. Given the enormous sums and the risks involved, underwriters will be under enormous pressure to pay a great deal now rather than hold out and risk paying a gargantuan amount later. The prospects that, if the underwriters would only wait until they have lost at trial, a different panel of the Second Circuit might well change course or this Court might grant review will provide little comfort.

Thus, as a practical matter, if certiorari is not granted now, this Court is unlikely ever to review the issues raised by the petition. Although this Court sometimes "postpone[s] consideration of [an] issue until more . . . federal circuits have experimented with [it]," see *Gilliard* v. *Mississippi*, 464 U.S. 867, 869 (1983) (Marshall, J., dissenting from denial of cert.), here the pressure to settle, and the concentration of these cases in New York, make further experimentation unlikely. Denying the petition would effectively banish to the unreviewable realm of settlement negotiations a legal question of "great importance to the public and the financial community." *Silver*, 373 U.S. at 342.

CONCLUSION

For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

ROBIN S. CONRAD
AMAR D. SARWAL
National Chamber Litigation Center, Inc.
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337

ROY T. ENGLERT, JR.
Counsel of Record
GARY A. ORSECK
DANIEL R. WALFISH
MATTHEW R. SEGAL
Robbins, Russell, Englert, Orseck & Untereiner LLP
1801 K Street, N.W.
Suite 411
Washington, D.C. 20006
(202) 775-4500

MARJORIE E. GROSS
The Bond Market Association
360 Madison Avenue
New York, NY 10017
(646)637-9204

GEORGE R. KRAMER
Securities Industry Association
1425 K Street, N.W.
Washington, D.C. 20005
(202)216-2000

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No. 05-1157

IN THE

Supreme Court of the United States

CREDIT SUISSE SECURITIES (USA) LLC, *et al.*,

Petitioners,

v.

GLEN BILLING, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

MOTION OF W.R. HAMBRECHT + CO., LLC, FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE IN SUPPORT OF PETITIONERS

PAUL MICHAEL KAPLAN
Counsel of Record
HOWARD M. ROGATNICK
BRYAN CAVE LLP
1290 Avenue of the Americas
New York, New York 10104
(212) 541-2000

Attorneys for W. R. Hambrecht + Co., LLC as Amicus Curiae

206196

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(800) 274-3321 • (800) 359-6859

W. R. Hambrecht + Co., LLC ("Hambrecht")[1] hereby respectfully moves for leave to file the attached brief *amicus curiae* in this case. The consents to the filing of this *amicus* brief have been obtained from counsel of record for petitioner, Credit Suisse Securities (USA) et al. and counsel of record for the respondent, Glen Billing. The consent of Russel H. Beatie was requested, but has not been received.

The interest of Hambrecht in this case arises from the fact that it is a full-service investment bank and is a proponent of the next generation system of underwriting securities, known as the OpenIPO auction. Hambrecht launched the OpenIPO auction in 1999. By combining auction theory with the internet in the form of an Internet-based Dutch auction, the OpenIPO auction provides both access (any qualified investor has an opportunity to bid for shares) and transparent pricing (the offering price is determined based on the actual demand for shares). Under the OpenIPO auction, share allocations are determined by reference to the price that each bidder is willing to pay for the offered shares. Since 1999, Hambrecht has conducted 17 OpenIPO deals.

As an innovator in the IPO field, Hambrecht has a direct concern with the interaction between the antitrust laws and the statutory scheme for regulating public offerings of securities, an interaction that lies at the heart of the legal issues posed by this case. The Court's determination of the

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1. W.R. Hambrecht + Co., Inc. is the parent holding company and sole member of three limited liability company subsidiaries: W.R. Hambrecht + Co., LLC, a broker dealer; W.R. Hambrecht + Co. Asset Management, LLC, a registered investment advisor; and W.R. Hambrecht Ventures I Management, LLC, the manager of a venture capital fund.

proper scope of implied antitrust immunity with regard to conduct involved in the IPO process will affect securities underwriters, including innovators such as Hambrecht.

Respectfully submitted,

PAUL MICHAEL KAPLAN
Counsel of Record
HOWARD M. ROGATNICK
BRYAN CAVE LLP
1290 Avenue of the Americas
New York, New York 10104
(212) 541-2000

Attorneys for W. R. Hambrecht + Co., LLC as Amicus Curiae

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MISCELLANEOUS

Herbert Hovenkamp, *Federal Antitrust Policy, The Law of Competition and Its Practice*, (3rd ed., Thompson/West 2005) 5

http://www.investorwords.com/1603/Dutch_auction.html 2

http://www.nasd.com/RulesRegulation/RuleFilings/2003RuleFilings/NASDW_001118 14

2 James Wm. Moore et. al., *Moore's Federal Practice* (3d ed. 2006) 11

No. 05-1157

IN THE

Supreme Court of the United States

CREDIT SUISSE SECURITIES (USA) LLC, *et al.*,

Petitioners,

v.

GLEN BILLING, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF W.R. HAMBRECHT + CO., LLC AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

This brief is submitted by W.R. Hambrecht + Co., LLC ("Hambrecht"), as *amicus curiae* in support of petitioners.[1]

1. In accordance with Supreme Court Rule 37.6, it is noted that the undersigned counsel for Hambrecht authored this brief in its entirety and that no person or entity other than Hambrecht has made a monetary (Cont'd)

W.R. Hambrecht + Co., Inc. is the parent holding company and sole member of three limited liability company subsidiaries: W.R. Hambrecht + Co., LLC, a broker dealer; W.R. Hambrecht + Co. Asset Management, LLC, a registered investment advisor; and W.R. Hambrecht Ventures I Management, LLC, the manager of a venture capital fund.

INTEREST OF HAMBRECHT AS AMICUS CURIAE

The interest of Hambrecht in this case arises from the fact that it is a full-service investment bank and is a proponent of the next generation system of underwriting securities, known as the OpenIPO auction. Hambrecht launched the OpenIPO auction in 1999 and has conducted 17 OpenIPO deals. This method is the only existing alternative to the traditional underwriting process for issuance of new securities. As such, it represents the next generation in capital formation for securities underwriting. By combining auction theory with the internet in the form of an Internet-based Dutch auction,[2] the OpenIPO auction provides both access (any

(Cont'd)

contribution to the preparation or submission of this brief. The consents to the filing of this *amicus* brief have been obtained from the attorneys for petitioner, Credit Suisse Securities (USA) et al. and the attorneys for the respondent, Glen Billing. The consent of Russel H. Beatie was requested, but has not been received.

2. Dutch auction, also known as descending price auction, uses a bidding process to find an optimal market price for the stock, the lowest price at which an issuing company can sell all the available shares. . . . Named after the famous auctions of Dutch tulip bulbs in the 17th century, it is based on a pricing system devised by Nobel Prize winning economist William Vickrey.

See http://www.investorwords. com/1603/Dutch_auction.html.

qualified investor has an opportunity to bid for shares), and transparent pricing (the offering price is determined based on the actual demand for shares). These concepts are the core principles of the OpenIPO auction, an auction system in which allocations are determined by reference to the price that each bidder is willing to pay for the shares.

The OpenIPO auction method is designed and intended to eliminate underpricing by obtaining a price that is closer to the actual market price. It is also designed to lead to less volatility in share price and a stable initial shareholder base, thereby benefiting both the issuers and the buyers of securities. Moreover, the OpenIPO auction protects the issuer and the underwriter from any potential liability for "underpricing" an initial public offering because the price is determined by the issuer and the underwriter based on a transparent analysis of demand. In an OpenIPO auction, the underwriters do not have the potential of an undisclosed conflict of interest because the underwriters do not control allocation of the securities. Instead, shares are awarded to successful bidders based solely on the price they bid and are awarded on a pro rata basis. The efficacy of the OpenIPO auction can be seen in its results.

The interaction between the antitrust laws and the statutory scheme for regulating public offerings of securities is at the heart of the legal issues posed by this case. Greater clarity in delineating the scope of implied antitrust immunity with regard to conduct involved in the IPO process will greatly affect innovators in this area such as Hambrecht and help to create a climate increasingly hospitable to Hambrecht's OpenIPO auction process.

SUMMARY OF ARGUMENT

Hambrecht supports petitioners' request that the respondents' claims be dismissed with prejudice. As the Court of Appeals acknowledged, many of the Complaint's allegations describe collaborative conduct in the capital formation process that the Securities and Exchange Commission (the "SEC") permits. Such authorized conduct, and conduct that is inextricably linked to such SEC approved conduct, should be deemed immune from antitrust challenge. The Court of Appeals erred in rejecting petitioners' immunity defense for all of the conduct set forth in the Complaint.

The Complaint's allegations regarding tie-in and laddering agreements should also be dismissed. These allegations are conclusory, and are contained in the background section of the Complaint. The Complaint is without doubt based in essence upon allegations of immune conduct, and all of the allegations are intertwined. Given the often subtle distinction between permissible and prohibited conduct in this area, involving refinements appropriately delegated to the SEC, and given the SEC's exercise of its regulatory authority with respect to the specific conduct at issue here, the Court of Appeals erred in declining to dismiss the entire Complaint based on implied immunity.

Hambrecht believes that greater clarity with regard to the issues presented in this case — which broadly involve the interaction of the antitrust laws with the regulatory scheme administered by the SEC, and the scope of implied antitrust immunity — would help to create an increasingly hospitable climate for Hambrecht's innovative Open IPO auction process.

ARGUMENT

I.

THE COURT OF APPEALS ERRED IN FAILING TO GRANT IMPLIED ANTITRUST IMMUNITY TO PERMISSIBLE UNDERWRITING CONDUCT

A leading commentator has observed that "[m]ost regulatory statutes say nothing at all about the impact of the regulatory regime on antitrust jurisdiction. In these cases, any limitation on or exemption from antitrust must be considered as implied rather than express . . . [and] the domain of the antitrust exemption is narrow." Herbert Hovenkamp, *Federal Antitrust Policy, The Law of Competition and Its Practice*, 716 (3rd ed., Thompson/West 2005). As this Court has stated, "[r]epeals of the antitrust laws by implication from a regulatory statute are strongly disfavored, and have only been found in cases of plain repugnancy between the antitrust and regulatory provisions." *United States v. Philadelphia National Bank*, 374 U.S. 321, 350-351 (1963).

However, the securities laws and regulations administered by the SEC permit, and in certain instances encourage, an array of collaborative conduct among underwriters and issuers. This Court has long recognized the need for a "proper reconciliation of the regulatory and antitrust statutes." *Gordon v. NYSE*, 422 U.S. 659, 685 (1975).[3] Indeed, the Court explained earlier in *Silver v. NYSE*,

3. *See Id.* at 689

> to deny antitrust immunity with respect to commission rates would be to subject the exchanges and their

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373 U.S. 341, 357 (1963), that the "proper approach" to a claim of antitrust immunity on the basis of another regulatory statute "is an analysis which reconciles the operation of both statutory schemes with one another rather than holding one completely ousted." As the Solicitor General points out, the antitrust laws should be understood as having been impliedly repealed with respect to SEC authorized collaboration among underwriters in the IPO process. *Sol. Gen. Br.* at 10.[4]

Although the Court of Appeals acknowledged that conduct authorized under the securities statutes is immune from antitrust liability, it declined to give full effect to that immunity, thereby exposing petitioners to the burden of having to defend themselves against costly antitrust litigation — carrying the possibility of treble damages — based on conduct permitted under the securities laws. The Court of Appeals erred by treating the Complaint's many specific factual allegations of authorized conduct "as an issue to be addressed solely as a matter of evidence."[5] *Id.* at 8. The Solicitor General correctly notes:

(Cont'd)

> members to conflicting standards. It is clear . . . that the commission rate practices of the exchanges have been subjected to the scrutiny and approval of the SEC. If antitrust courts were to impose different standards or requirements, the exchanges might find themselves unable to proceed without violation of the mandate of the courts or of the SEC.

4. Citations herein to "Sol. Gen. Br. at __" refer to the brief filed by the Solicitor General in this action at the request of the Court pending consideration of the Petition for Writ of Certiorari.

5. The Court of Appeals acknowledged in its opinion that the Complaint "details a host of conduct recognized as legitimate by the

(Cont'd)

> [A] complaint's generalized allegations of conduct prohibited under the regulatory scheme should not preclude dismissal on immunity grounds if the complaint's allegations to that effect ultimately rest on collaborative activities that are either permitted under the securities laws or inextricably intertwined with such permitted activities, because such conduct is impliedly immune from antitrust liability.

Id. at 8. Moreover, we agree with the Solicitor General's conclusion that: "It is of paramount importance that the capital formation process in this county not be undermined by the threat of treble damages liability based on conduct inextricably linked to the collaborative activities authorized and regulated by the SEC under the Securities laws." *Id.*

(Cont'd)

SEC — in particular, the use of syndicates and the book-building process." *Pet. App.* 61a n.47. Although it reversed the district court's finding of immunity, and remanded for further proceedings, the Court of Appeals was careful to "leave the district court the task of ensuring that defendants do not suffer prejudice from any evidence of their legitimate activities." *Id.* Thus, while the Second Circuit did not focus its opinion on the host of "legitimate activities" alleged in the Complaint, implicit in the above remarks is the suggestion that such activities should be deemed immune and the allegations related to them dismissed, thereby "ensuring that the defendants do not suffer prejudice." *Id.* Hambrecht submits, however, that this implicit suggestion should have been made explicit in the Court of Appeals' ruling, *i.e.*, the district court's dismissal of the Complaint's allegations of "legitimate activities" should have been upheld.

Syndicated underwriting is "an essential means" by which underwriters share risks in public securities offerings. *Pet. App.* 5a. This system "inherently involves agreements and joint actions among potential (and actual) competitors, including agreements about price that, but for the securities regulatory regime, would raise substantial antitrust concern." *Id.* at 192a. Congress was aware of the syndicated underwriting system when it enacted the Securities Act of 1933 and the Securities Exchange Act of 1934. Indeed, the legislative and regulatory history reveal that Congress favored regulation of syndicated underwriting, not proscription. *See generally id.* at 4a-16a, 133a-136a. The authorized collaborative activities involved in forming and operating underwriting syndicates should therefore be deemed impliedly immune from the antitrust laws.

Indeed, as the government's filings in the lower courts pointed out, and the Court of Appeals acknowledged, many of the Complaint's specific allegations describe practices which the SEC permits, and in certain instances encourages, as part of the capital formation process. These practices include:

- forming into underwriting syndicates;
- collaborating as members of exchanges and trade associations;
- agreeing that the lead underwriters will distribute all shares;
- agreeing that all syndicate members will share in the underwriter's discount;
- conducting meetings among investment bankers, legal officers and market makers; and

- disclosing information regarding each underwriter's IPO customers.

See Pet. App. 154a-155a, 177a, 206a-207a (referring to conduct alleged in *Am. Compl.* ¶¶ 38, 39, 45-48, 56, 62).

Such authorized conduct should undoubtedly be deemed immune from antitrust challenge. For example, in *Gordon v. NYSE*, 422 U.S. 659, private plaintiffs sought to impose antitrust liability for the fixing of commissions pursuant to exchange rules. Implied immunity from the antitrust laws was held to exist, however, because the SEC had "thoroughly exercised its supervisory powers" over the system of fixed commissions, 422 U.S. at 688, and had approved the use of fixed rates, 422 U.S. at 667-675, 689-690. This Court explained that although the SEC had never issued a formal order requiring fixed rates, its actions had "an effect equivalent to that of a formal order." *Id.* at 689 n.13. Similarly, *United States v. National Ass'n of Sec. Dealers, Inc.*, 422 U.S. 694 (1995) ("*NASD*"), involved a challenge to vertical restrictions on mutual fund sales and distribution which would have been illegal *per se* under the antitrust laws. 422 U.S. at 729, 733. Although the activities at issue were not specifically required or approved by the SEC, they were nonetheless deemed immune because they were "designed to encourage . . . precisely the restriction that the SEC consistently ha[d] approved pursuant to [statute] for nearly 35 years." *Id.* at 733.

In Hambrecht's view, the Court of Appeals erred in not upholding the district court's dismissal of the Complaint with respect to allegations of collaborative conduct approved by the SEC and therefore entitled to immunity from the antitrust laws. Moreover, immunity should be granted to related conduct that "cannot practically be separated from authorized conduct."

Sol. Gen. Br. at 10.[6] Indeed, "[f]ailure to recognize immunity for activities that are inextricably intertwined with permissible collaborative conduct could effectively vitiate the immunity for the authorized conduct and thus conflict with the regulatory scheme." *Id.*

II.

THE COURT OF APPEALS ERRED IN NOT UPHOLDING THE DISMISSAL OF THE COMPLAINT'S INSUFFICIENT BACKGROUND ALLEGATIONS CONCERNING TIE-IN AND LADDERING AGREEMENTS

The Court of Appeals directed its immunity analysis at the Complaint's general allegations that petitioners had engaged in tie-in and laddering practices, which are unlawful under the securities laws.[7] The Solicitor General's brief,

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6. Thus, for example, in *NASD*, 422 U.S. at 733-734, this Court held that horizontal agreements among competing NASD members to encourage vertical restraints in the mutual fund secondary market were entitled to implied immunity because the vertical restraints imposed by such horizontal agreements had been consistently approved by the SEC. *See Phonetele, Inc. v. Am. Tel. & Tel. Co.*, 664 F.2d 716, 729 (9th Cir. 1981) (then Judge Kennedy explaining that the court in *NASD* had "reasoned the concerted activity had acquired a kind of derivative immunity by virtue of its relation to the immune restraints implemented by the concerted action.")

7. As the Solicitor General's Brief points out, with regard to allegations of tie-in and laddering agreements, "there is no legislative history suggesting an intent to immunize such conduct nor would application of the antitrust laws to such conduct be inconsistent with or render nugatory any provision of the securities laws." *Sol. Gen. Br.* at 7.

however, has aptly pointed out a significant deficiency in respondents' pleading that confirms the error of the Court of Appeals:

> In this case, it is particularly difficult to discern whether respondents have adequately pleaded non-immune anticompetitive conduct sufficient to overcome the immunity defense, because the allegations of forbidden tie-in and laddering agreements are largely confined to more conclusory assertions in the background section of the complaint, whereas the more specific factual allegations concerning the alleged unlawful agreements detail conduct that is (or might be) immune.

Sol. Gen. Br. at 11.[8]

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8. The Complaint's reliance on protected conduct and its intermixing of conclusory allegations that petitioners engaged in prohibited anticompetitive conduct with more detailed allegations of collaborative conduct approved by the regulatory authority cannot overcome petitioners' implied immunity defense. "Especially when a particular element critically distinguishes innocuous (or, indeed, desirable) conduct from wrongdoing, allegations concerning that element must be concrete, rather than conclusory." *See Brief for United States, Bell Atlantic Corp. v. Twombly*, 126 S. Ct. 2965 (2006) (No. 05-1126 at 12). Moreover, "[w]hether a statement of a claim is sufficient to give fair notice depends in part on the complexity of the case." 2 James Wm. Moore et. al., *Moore's Federal Practice* §8.04[1][a], at 8-24.1 (3d ed. 2006). Thus, in cases of "magnitude" a court "must retain the power to insist upon some specificity in pleading before allowing a potentially massive factual controversy to proceed." *Associated Gen. Contractors of Cal., Inc. v. California State Council of Carpenters*, 459 U.S. 519, 528 n.17 (1983).

Thus, respondents in their "Summary of Allegations," *Am. Compl.* 1, allege that petitioners engaged in "laddering" by "agree[ing] to require that, in order to obtain IPO shares of a Class Security, customers had to place bids for and/or purchase quantities of such Class Security in the aftermarket at prices above the IPO price in order to systematically and significantly inflate the aftermarket prices of IPO's." Yet, in a later section of the Complaint spelling out the more specific laddering allegation, respondents assert that during "road shows" and in other contacts with customers before the IPO, petitioners "at times jointly, made inquires of customers or others interested in purchasing Class Securities concerning the number of shares that such person would be willing to purchase in the aftermarket and the prices such person would be willing to pay for such shares." *Id.* ¶ 54. The latter allegation, however, can delineate bookbuilding conduct that the SEC has specifically permitted. *See Pet. App.* 227a-228a (SEC's April 2005 guidance authorizing inquiries "as to customers' desired future position in the longer term, for example, three to six months, and the price or prices at which the customers might accumulate that position," while noting that, in contrast, "inquir[ing] whether the customer intends to place orders in the immediate aftermarket, and if so, at what price and quantities" constitutes an impermissible tie-in).

The SEC has engaged in expert line-drawing with respect to the conduct alleged in this case of precisely the type that the doctrine of implied immunity is designed to accommodate. Moreover, the precise, expert line-drawing required in this area to distinguish between permissible, authorized conduct and impermissible, illegal conduct is, we submit, better left to the regulatory agency with the desired expertise, rather than relegated to private actions, juries, and

courts wielding the blunt instrument of treble damages under §4 of the Clayton Act.[9]

Indeed, even if the Court does not accept the "pervasive regulation" theory asserted in petitioners' certiorari petition, the SEC has engaged in expert line-drawing with respect to the *specific* conduct at issue. Petitioners have pointed out:

> To the extent the alleged tie-in conduct might violate the securities laws, the SEC is "actively pursuing" a comprehensive regulatory respons[e]." App., *infra*, 127a. The Commission and the NASD investigated IPO allocation practices following the market bubble and have filed and settled actions against several investment banks. *Id.* at 137a-138a. Each of those actions alleged that the investment bank engaged in one or more of the IPO allocation practices challenged here, involved alleged violations of Regulation M or NASD Conduct Rule 2110, and settled without an admission or denial of liability. E.g., *SEC v. Credit Suisse First Boston* (Jan. 22, 2002), www.sec.gov/ litigation/litreleases/lrl7327.htm; see App., *infra*, 196a. In addition, the SEC has established a blue-ribbon panel to recommend rule changes. *Ibid.* To date the SEC has proposed

9. *See, e.g., Gordon*, 422 U.S. at 689-690

> Given the expertise of the SEC, the confidence the Congress has placed in the agency, and the active roles the SEC and the Congress have taken, permitting courts throughout the country to conduct their own antitrust proceedings would conflict with the regulatory scheme authorized by Congress rather than supplement that scheme.

> amendments to Regulation M prohibiting underwriters from receiving consideration from IPO customers above the offering price of a security. Release No. 34-50831, 69 Fed. Reg. 75774 (Dec. 17, 2004). It also is reviewing proposed SRO rule changes addressing "quid pro quo allocations" of IPO stock. Release No. 34-50896, 69 Fed. Reg. 77804 (Dec. 28, 2004). See App., *infra*, 137a-139a, 194a-197a.[10]

Petitioners' Petition for a Writ of Certiorari at 7.

Given the often subtle distinction between permissible and prohibited conduct in this area, involving refinements appropriately delegated to the SEC, and given the SEC's exercise of its regulatory authority with respect to the specific conduct at issue here, the Court of Appeals erred in declining to grant implied immunity for the conduct alleged in the Complaint. Moreover, because the Complaint is based in essence upon allegations of immune activity, the Court of Appeals erred in its blanket rejection of petitioners' immunity defense for all of the conduct set forth in the Complaint.

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10. The SEC's rule making with regard to preferential allocation of shares has been deferred until April, 2007. http://www.nasd.com/RulesRegulation/RuleFilings/2003RuleFilings/NASDW_001118. It should be noted that a version of this Rule making, 10b20, was first proposed in 1974-75 and was withdrawn by the SEC in 1988.

CONCLUSION

Hambrecht supports the maintenance and development of competitive markets for capital formation in securities underwriting. Competitive markets in securities underwriting promote efficiencies and innovations, such as the OpenIPO auction, and consumer welfare, thus helping to effectuate the principal goal of the antitrust laws and to reinforce the very foundation of our economic liberty.

In accordance with the arguments set forth in this *amicus* brief, Hambrecht respectfully supports the petitioners' request that the decision of the Court of Appeals be reversed.

Respectfully submitted,

PAUL MICHAEL KAPLAN
Counsel of Record
HOWARD M. ROGATNICK
BRYAN CAVE LLP
1290 Avenue of the Americas
New York, New York 10104
(212) 541-2000

Attorneys for W. R. Hambrecht + Co., LLC as Amicus Curiae

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v.

GLEN BILLING, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

MOTION FOR LEAVE TO FILE AND BRIEF OF THE WASHINGTON LEGAL FOUNDATION AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

JAMES A. MEYERS
(Counsel of Record)
ORRICK, HERRINGTON & SUTCLIFFE LLP
3050 K Street, N.W.
Washington, DC 20007
(202) 339-8400

Counsel for Amicus Curiae Washington Legal Foundation
[Additional Counsel on Signature Page]

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D.C. 20001

MOTION OF WASHINGTON LEGAL FOUNDATION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE IN SUPPPORT OF PETITIONERS

Pursuant to Supreme Court Rule 37.2, the Washington Legal Foundation respectfully moves the Court for leave to file the attached brief as *amicus curiae* in support of petitioners.

The Washington Legal Foundation ("WLF") has received written consent from petitioners to file this brief and has filed such consent with the Clerk of the Court. WLF has been unable to obtain respondents' consent, thereby necessitating this motion.

WLF is a non-profit public interest law and policy center based in Washington, D.C., with supporters in all 50 states. WLF devotes a substantial portion of its resources to defending and promoting free enterprise, individual rights, and a limited and accountable government. To that end, WLF has appeared before this and other federal and state courts in numerous cases raising issues relating to the proper scope of the federal securities laws. *See, e.g., Dura Pharmaceuticals, Inc. v. Broudo,* 544 U.S. 366 (2005); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Dabit*, 126 S. Ct. 1503 (2006); *In re Stock Exchanges Options Trading Antitrust Litig.*, 317 F.3d 134 (2d Cir. 2003). WLF has no financial interest in the outcome of this case.

WLF is concerned that if the Second Circuit's decision below is not reversed, the result will be conflicting or duplicative over-regulation of critical aspects of the capital formation process in the United States, contrary to Congress' express decision to commit regulation of such activities to the expert judgment of the Securities and Exchange Commission, and likely to interfere with the preeminence of the U.S. capital markets in the global arena.

For the reasons set forth above and pursuant to Supreme Court Rule 37.2(b), the Washington Legal Foundation respectfully moves the Court for leave to file the attached brief as *amicus curiae* in support of Petitioners.

Respectfully submitted,

DANIEL J. POPEO
RICHARD A. SAMP
WASHINGTON LEGAL FOUNDATION
2009 Massachusetts Ave, N.W.
Washington, D.C. 20036
(202) 588-0302

JAMES A. MEYERS
Counsel of Record
GARRET G. RASMUSSEN
ANTONY P. KIM
ORRICK, HERRINGTON & SUTCLIFFE LLP
3050 K Street, N.W.
Washington, D.C. 20007
(202) 339-8400

HOWARD M. ULLMAN
ERIN L. BANSAL
CATHY LUI
ORRICK, HERRINGTON & SUTCLIFFE LLP
405 Howard Street
San Francisco, CA 94105
(415) 773-5700

DANIEL TYUKODY
ORRICK, HERRINGTON & SUTCLIFFE LLP
777 South Figueroa Street
Suite 3200
Los Angeles, CA 90017
(213) 612-2020

Counsel for Amicus Curiae Washington Legal Foundation

January 22, 2007

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Cases:

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Dura Pharmaceuticals, Inc. v. Broudo,
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Gordon v. New York Stock Exch.,
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In re Initial Pub. Offering Sec. Litig.,
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In re Stock Exchs. Options Trading Antitrust Litig., 317 F.3d 134 (2d Cir. 2003) 9
Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Dabit, 125 S. Ct. 1503 (2006) 19
National Gerimedical Hospital and Gerontology Center v. Blue Cross of Kansas City,
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Tellabs, Inc. v. Makor Issues & Rights, Ltd.,
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Texas Indus., Inc. v. Radcliff Materials, Inc.,
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United States v. National Ass'n of Sec. Dealers,
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Verizon Communications v. Law Offices of Curtis V. Trinko, 540 U.S. 398 (2004) 2, 3, 10, 25

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Statutes and Regulations:

Securities Act, 15 U.S.C. §§ 77a, *et seq.* 4, 17
15 U.S.C. § 77b(a)(3) (Act § 2(a)(3)) 4, 17
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Securities Exchange Act, 15 U.S.C. §§ 78a, *et seq.* . *passim*
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15 U.S.C. § 78o(c)(1) 5
15 U.S.C. § 78o-3(a)-(b) 5
15 U.S.C. § 78o-3(b)(6) 5
15 U.S.C. § 78o-3(e) 5
15 U.S.C. § 78s(b)(1) 5
15 U.S.C. § 78mm 12

Securities Litigation Reform Act of 1995
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15 U.S.C. § 78u-4 18
15 U.S.C. § 78u-4(b) 18

Securities Litigation Uniform Standards Act of 1998
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17 C.F.R. § 230-134(d) 17

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17 C.F.R. § 240.10b-1 (SEC Rule 10b-1) 16

17 C.F.R. §§ 242.100-105 (Regulation M) 6, 11, 12

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NASD Manual, IM-2440 16

Miscellaneous:

Paul Atkins, *A Serious Threat to Our Capital Markets*, Wall St. J. (June 10, 2006) 22, 23-24

Commission Guidance Regarding Prohibited Conduct in Connection with IPO Allocations, Release Nos. 33-8565, 34-51500, 70 Fed. Reg. 19672 (Apr. 13, 2005) ("Allocations Guidance") 6, 10, 11

Jill E. Fisch, *Imprudent Power: Reconsidering U.S. Regulation of Foreign Tender Offers*, 87 NW. U. L. REV. 523 (Winter 1993) 22

Page(s)

Herbert Hovenkamp, *Antitrust Violations in Securities Markets*, 28 J. CORP. L. 607 (2003) 20, 24

Herbert Hovenkamp, THE ANTITRUST ENTERPRISE (2005) 25

Interim Report of the Committee on Capital Markets Regulation (2006) 20, 21

Craig Karmin & Aaron Lucchetti, *New York Loses Edge in Snagging Foreign Listings*, Wall St. J., at C1 (Jan. 26, 2006) 21, 23

Richard Liebeskind, Bryan R. Dunlap & Gena Chieco, *SEC, Antitrust Division May Square Off Over Jurisdiction*, Mondaq, at *1 (Aug. 3, 2006) 22

Charles E. Schumer and Michael R. Bloomberg, *To Save New York, Learn from London*, Wall St. J., at A18 (Nov. 1, 2006) 21, 22

Michelle Tsai and Lynn Cowan, *IPO Outlook: Chinese IPOs Stick Close to Home - Not Many Firms Make Debut in U.S. Amid Lawsuit Fears, Costs, Strict Regulation*, Wall St. J., at C4 (Mar. 20, 2006) 21, 22

Proposed Rule 10b-20, Release No. 10636, 39 Fed. Reg. 7806 (Feb. 11, 1974) 5

Release No. 26182, 53 Fed. Reg. 41,206 (Oct. 20, 1988) 5

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SEC Release No. 33-7183,
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(Dec. 12, 1980) ("Papilsky Release") 17

Securities Exchange Act Release No. 50831,
69 Fed. Reg. 75,774 (Dec. 17, 2004) 12

H.R. Conf. Rep. 104-369 (1995) 18, 19

BRIEF OF WASHINGTON LEGAL FOUNDATION AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

INTEREST OF AMICUS CURIAE

The Washington Legal Foundation ("WLF") is a non-profit public interest law and policy center based in Washington, D.C., with supporters in all 50 states.[1] WLF devotes a substantial portion of its resources to defending and promoting free enterprise, individual rights, and a limited and accountable government. To that end, WLF has appeared before this and other federal and state courts in numerous cases raising issues relating to the proper scope of the federal securities laws. *See, e.g., Dura Pharmaceuticals, Inc. v. Broudo,* 544 U.S. 366 (2005); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Dabit*, 126 S. Ct. 1503 (2006); *In re Stock Exchanges Options Trading Antitrust Litig.*, 317 F.3d 134 (2d Cir. 2003). WLF has no financial interest in the outcome of this case.

WLF is concerned that if the Second Circuit's decision below is not reversed, the result will be conflicting or duplicative over-regulation of critical aspects of the capital formation process in the United States, contrary to Congress' express decision to commit regulation of such activities to the expert judgment of the Securities and Exchange Commission ("SEC") and likely to interfere with the preeminence of the U.S. capital markets in the global arena.

SUMMARY OF ARGUMENT

Implied antitrust immunity often attaches when conduct is subject to a "detailed regulatory scheme." *Verizon*

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[1] Pursuant to Supreme Court Rule 37.6, amicus states that no counsel for any party authored this brief in whole or in part, and that no person or entity, other than amicus and its counsel, contributed monetarily to the preparation or submission of this brief.

Communications v. Law Offices of Curtis V. Trinko, 540 U.S. 398, 406 (2004). The alleged tie-in and other arrangements here are necessarily immune from antitrust attack because they are actively regulated by the SEC under three broad grants of statutory authority. Subjecting petitioners here to antitrust liability would pose an actual or potential conflict with the SEC's regulatory scheme.

Moreover, the SEC's congressional mandate expressly incorporates antitrust's goal of promoting fair and competitive markets. Congress has also enacted reform legislation and other procedural safeguards against abusive litigation to complement SEC enforcement. Layering treble-damage antitrust suits on top of this already robust framework threatens to over-deter conduct that is beneficial and even crucial to the proper functioning of U.S. equity markets. Given the mounting perception abroad that U.S. markets are replete with regulatory and litigation risks, the specter of antitrust liability will only further diminish the attractiveness and competitiveness of the U.S. with respect to global capital-raising activities.

ARGUMENT

I. IMPLIED ANTITRUST IMMUNITY ATTACHES TO THE CONDUCT ALLEGED BY RESPONDENTS.

The Second Circuit in its opinion below is the first and only court to have rejected the SEC's view that implied antitrust immunity is necessary to allow the agency to perform its regulatory functions. The Second Circuit's opinion creates a novel test for application of the doctrine of implied antitrust immunity that is inconsistent with this Court's precedents. As the Court explained in *Verizon Communications v. Law Offices of Curtis V. Trinko*, 540 U.S. 398 (2004), when a regulatory structure "designed to deter

and remedy anticompetitive harm" exists, "the additional benefit to competition provided by antitrust enforcement" is "small" and it is "less plausible that the antitrust laws contemplate such additional scrutiny." *Id.* at 412. Indeed, a "detailed regulatory scheme" "ordinarily raises the question whether the regulated entities are not shielded from antitrust scrutiny altogether by the doctrine of implied immunity." *Id.* at 406, citing *United States v. National Ass'n of Sec. Dealers*, 422 U.S. 694 (1975), and *Gordon v. New York Stock Exch.*, 422 U.S. 659 (1975). Here, the SEC, applying its expertise regarding securities law and the securities markets, regulates precisely the type of behavior that respondents challenge. The potential for conflict with the antitrust laws requires application of the implied immunity doctrine.

Respondents, who invested in Initial Public Offerings ("IPOs") and purchased shares directly from petitioners or indirectly on the aftermarket, allege an antitrust conspiracy involving underwriters' formation of syndicates to spread out the risk inherent in the IPO market. *See* Am. Compl. ¶¶ 37-38, *see also* Pet. App. 91a. As part of this conspiracy, respondents allege that petitioners (i) made inquiries concerning the number of shares customers would be willing to purchase in the aftermarket, and the prices persons would be willing to pay (*id.* ¶¶ 45, 54); (ii) shared the identities of IPO allocants and divided responsibilities among members of the syndicate (*id.* ¶¶ 39, 56); (iii) participated in registered stock exchanges, such as the New York Stock Exchange ("NYSE"), and other self-regulatory organizations ("SROs"), such as the NASD (*id.* ¶¶ 46-47); and (iv) favored long-term investors over "flippers" of IPO shares (securities purchasers who sell the securities they buy after a short period of time) (Pfeiffer Compl. ¶¶ 64-65, 81). Respondents also allege that the underwriters conspired to impose "anticompetitive charges" in the form of "tie-in" or "laddering" requirements. These alleged obligations purportedly required purchasers to commit to purchase securities in the aftermarket at escalating

prices, to purchase the issuer's securities in subsequent offerings, or to purchase other, possibly less attractive securities. *See* Pet. App. 17a-18a, 73a-74a, Am. Compl. ¶¶ 1-7.

A. The SEC Regulates The Conduct At Issue Under Three Statutory Schemes.

Three general sources of regulatory authority grant the SEC broad power to regulate the activity at issue. First, the SEC has power under the Securities Act, 15 U.S.C. §§ 77a, *et seq.*, to regulate the offering process, including communications during so-called "road shows" to "build books" during the IPO process. *See* Memorandum Amicus Curiae of the SEC Submitted at the Request of The Court ("SEC Brief"), Pet. App. 132a-133a (citing 15 U.S.C. § 77(b)(a)(3), which excludes communications among underwriters who are in privity of contract with the issuer of the security from the scope of the offering restrictions; 17 C.F.R. § 230.134, which assists the process of building the book by permitting collection of indications of interest in the IPO; and 17 C.F.R. §§ 230.137-139, which discuss permitted communications through issuance of research reports).

Second, under the Securities Exchange Act, 15 U.S.C. §§ 78a, *et seq.* ("Exchange Act"), the SEC has authority to define manipulative practices and adopt rules to permit and regulate, or to proscribe and prevent, such practices. *See* SEC Brief at 134a (citing 15 U.S.C. § 78i(a), which outlaws certain forms of manipulative conduct involving securities listed on exchanges, and also empowers the SEC to determine whether certain potentially abusive practices involving those securities should be prohibited, permitted, or regulated; 15 U.S.C. § 78j(b), which gives the SEC rulemaking authority to address manipulation and fraud, making it unlawful for any person to employ "any manipulative, deceptive, or other fraudulent device or

contrivance in contravention of such rules as the Commission may prescribe"; and 15 U.S.C. § 78o(c)(1), which prohibits broker-dealers from effecting any securities transaction "by means of any manipulative, deceptive, or other fraudulent device of contrivance" and also gives the Commission the power "by rules and regulations [to] define, and prescribe means reasonably designed to prevent, such acts and practices as are fraudulent, deceptive, or manipulative."). In addition, 15 U.S.C. § 78i(a)(6) authorizes the SEC to regulate transactions effected "for the purpose of pegging, fixing, or stabilizing the price of [a] security ...."

Third, the SEC oversees broker-dealer conduct, including communications, commissions, and underwriter fee arrangements, both directly and through its regulatory oversight of the NASD. *See* Exchange Act, 15 U.S.C. §§ 78c(a)(26), 78o, 78o-3(a)-(b). Section 15A(e) of the Exchange Act, 15 U.S.C. § 78o-3(e), and NASD Rule 2740 have the effect of requiring that members of underwriting syndicates be members of the NASD, so NASD rules governing offerings apply to all syndicate participants. *See* SEC Brief, Pet. App. at 136a. The rules of the NASD – an SRO – go into effect only after the SEC finds them consistent with securities law requirements. *See* 15 U.S.C. §§ 78o-3(b)(6), 78s(b)(1).

These three sources of statutory authority are not empty shells. The SEC actually and actively regulates the conduct at the core of respondents' complaints under the statutory authority granted to it. A 1974 proposed SEC rule would have barred underwriters from requiring payments, including certain forms of tie-in arrangements, in addition to the IPO share price. *See* Proposed Rule 10b-20, Release No. 10636, 39 Fed. Reg. 7806 (Feb. 11, 1974). The SEC withdrew the proposed rule in 1988, *see* Release No. 26182, 53 Fed. Reg. 41,206 (Oct. 20, 1988), because it considered, but eventually rejected, imposing bright-line rules concerning

tie-in arrangements and other aftermarket practices, "favoring instead a flexible regulatory approach under its general anti-fraud provisions, now embodied in Regulation M." Pet. App. 112a. Regulation M, found at 17 C.F.R. §§ 242.100-105, contains "prophylactic prohibitions" "intended to prevent those having a financial interest in a distribution from either manipulating the price of a security or boosting its trading volume and thereby misleading potential investors as to the 'true' state of the public market for the security being distributed." SEC Brief, Pet. App. 135a. In particular, Regulation M prohibits issuers, selling security holders, underwriters, and other distribution participants from bidding for or purchasing, or attempting to induce others to bid for or purchase, the securities being distributed during the specified restricted period. Regulation M also governs "stabilization" (efforts to prevent the price to fall below the offering price during the offering) and related activities in connection with an offering. *See id.*

Regulation M thus focuses on the very behavior challenged by respondents in this case. However, determining whether or not activity is prohibited by Regulation M is not a mechanical exercise. The SEC has emphasized that whether a communication constitutes permissible book-building or an attempt to induce a bid or purchase in violation of Regulation M "depends on the particular facts and circumstances ...." Commission Guidance Regarding Prohibited Conduct in Connection with IPO Allocations, Release Nos. 33-8565, 34-51500, 70 Fed. Reg. 19672 (Apr. 13, 2005) ("Allocations Guidance"), Pet. App. 225a. Thus, underwriters may lawfully discuss with potential investors the investors' desired long-term future position in a security, the price at which the customer might accumulate that position, and whether and at what price the investor will hold the securities or sell the shares in the immediate aftermarket. *See id.* at 224a. The SEC contrasts these permissible discussions with impermissible statements

that immediate aftermarket buying would help investors obtain allocation of "hot" IPOs. *See id.* at 227a. The differences between permissible and impermissible discussions may be vanishingly small.

B. The Potential For Conflict Between SEC Regulation And Antitrust Law Requires Application Of The Implied Immunity Doctrine.

The conduct at issue here – conduct involving the IPO book-building process – is subject to SEC regulation. In particular, the alleged tie-in and other arrangements challenged by respondents are actively regulated by the SEC. Under this Court's precedents, antitrust law's potential or actual conflict with securities regulation triggers the implied immunity doctrine.[2]

In *Gordon*, the Court applied the implied immunity doctrine to reject a private antitrust challenge to the practice of securities exchanges' and their members' fixing of commission rates. In so doing, it recognized that implied immunity attaches not only when there is a "pervasive" regulatory scheme, but also when the regulatory agency has regulatory authority over the conduct in question and has exercised that authority. *See* 422 U.S. at 688-89. Although the fixing of commission rates was prohibited at the time by both the securities laws and the antitrust laws, because the SEC had the statutory authority to permit such conduct in the future, the Court perceived a potential conflict. *See id.* at 690-91. The plaintiffs in *Gordon*, the Court wrote, had

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[2] Although the challenged conduct at issue here may also be immune under the "pervasive regulation" test for immunity articulated in *United States v. National Ass'n of Sec. Dealers*, 422 U.S. 694 (1975), the Court need not reach that question to conclude that implied immunity attaches under the actual or potential conflict rule.

confused two questions – the factual question whether fixed commission rates are actually necessary to the operation of the exchanges and the legal question "whether allowance of an antitrust suit would conflict with the operation of the regulatory scheme which specifically authorizes the SEC to oversee the fixing of commission rates." *Id.* at 688.[3] In other words, the relevant question was not whether antitrust law allowed or disallowed the fixing of commission rates, but whether antitrust immunity must be implied in order to permit the Exchange Act to function as envisioned by Congress. *See id.* In answering this question in the affirmative, the Court wrote that "if antitrust courts were to impose different standards or requirements, the exchanges might find themselves unable to proceed without violation of the mandate of the courts or of the SEC." *Id.* at 689.

The potential for conflict in *Gordon* existed because the securities laws and the antitrust laws advance different goals. "[T]he sole aim of antitrust legislation is to protect competition whereas the SEC must consider, in addition, the economic health of the investors, the exchanges, and the securities industry." *Id.* at 689. Therefore, application of the antitrust laws, which would bar fixed commission rates as a *per se* violation of the Sherman Act, "would preclude and prevent the operation of the Exchange Act as intended by Congress and as effectuated through SEC regulatory activity." *Id.* at 691. Importantly, Congress confirmed the divergent goals of SEC regulation and antitrust law when it amended the Exchange Act in 1996 to provide that when the SEC is engaged in rulemaking "and is required to consider or determine whether an action is necessary or appropriate in the public interest," it "shall also consider, in addition to the

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[3] *See also National Gerimedical Hospital and Gerontology Center v. Blue Cross of Kansas City*, 452 U.S. 378, 388-89 (1981) (the ultimate issue is whether permitting antitrust liability is clearly repugnant to the regulatory *system*).

protection of investors, whether the action will promote efficiency, competition, and capital formation." *Id.* 15 U.S.C. § 77b(b). This statutory mandate directs the SEC to consider competition as only one of three factors in its rulemaking capacity. Logically, this directive raises the possibility that the SEC may adopt rules that are not wholly consistent with the narrow purposes of competition law.

The Second Circuit's decision in *Friedman v. Salomon/Smith Barney, Inc.*, 313 F.3d 796, 799 (2d Cir. 2002), *cert. denied*, 540 U.S. 822 (2003), confirms that, as the district court below succinctly stated, "the ... 'repugnancy' required to trigger implied immunity need not be a firefight between the antitrust laws and securities regulation, but rather 'extends to potential as well as actual conflicts.'" Pet. App. 82a, quoting *Friedman* at 799. In *Friedman*, although the SEC did not expressly permit broker-dealer restrictions to discourage the "flipping" of IPO shares in order to stabilize aftermarket prices, the Second Circuit nevertheless found that implied antitrust immunity attached to such practices, reasoning that allowing an antitrust lawsuit to proceed would conflict with Congress' implicit determination that the SEC should regulate the alleged anti-competitive conduct. *Friedman*, 313 F.3d at 801. Similarly, in *In re Stock Exchs. Options Trading Antitrust Litig.*, 317 F.3d 134 (2d Cir. 2003), although the practice of restricting equity options trading to one exchange was prohibited by both antitrust law as well as the securities laws, the Second Circuit found that implied immunity attached to the practice because the SEC had ample statutory authority, which it had repeatedly exercised, to regulate the listing and trading of equity options, and the specific conduct at issue fell within that broader authority. *See id.* at 150. "The appropriateness of an implied repeal does not turn on whether the antitrust laws conflict with the current view of the regulatory agency; rather it turns on whether the antitrust laws conflict with an overall regulatory scheme that empowers the agency to allow

conduct that the antitrust laws would prohibit." *Id.* at 149. Here, as discussed above, the SEC has ample statutory authority to regulate the entire IPO process, and in fact exercises that authority.

Respondents' rejoinder that immunity should not attach to alleged conduct that the SEC does not and cannot permit – *i.e.*, excessive commissions, or laddering arrangements designed to increase securities prices – is misplaced. Allowing antitrust actions challenging the same conduct forbidden by the securities laws and the SEC would expose defendants to duplicative standards and liability. *See NASD*, 422 U.S. at 735. Under *Trinko*, when a regulatory structure "designed to deter and remedy anticompetitive harm" exists, "the additional benefit to competition provided by antitrust enforcement" is "small" and it is "less plausible that the antitrust laws contemplate such additional scrutiny." *Id.* at 412. As discussed below in Section II, the SEC robustly enforces the securities laws and its own regulations as they apply to the IPO formation process. Antitrust damages are not necessary to ensure compliance with securities law.

Moreover, as discussed *supra*, the line between permissible and impermissible communications during the IPO book-building process is a very fine, and wavering, one. Thus, for example, "[c]ommunicating to customers that expressing an interest in buying shares in the immediate aftermarket ('aftermarket interest') or immediate aftermarket buying would help them obtain allocations of hot IPOs" would be contrary to SEC regulations. However, "inquiring as to customers' desired future position in the longer term (for example, three to six months) and the price or prices at which customers might accumulate that position, without reference to immediate aftermarket activity, does not, without more, fall within this violative conduct." Allocations Guidance, Pet. App. 227a. As the SEC noted in its

Allocations Guidance, the lawfulness of behavior in this area "depends on the particular facts and circumstances surrounding such activity or communication." *Id.* at 225a.

Notably, the SEC's guidance in this area has changed over time, and is likely to change in the future as the SEC's understanding of the issues evolves. When the Commission proposed and adopted Regulation M, it announced that it would gather information about activities in the aftermarket for offerings so that it could evaluate whether any additional regulation was necessary. *See* SEC Release No. 33-7283, 61 Fed. Reg. 17108, 17124 (April 11, 1996); SEC Release No. 33-7375, 62 Fed. Reg. at 537-38. The Commission planned this review:

> in order to address commenters' concerns that certain aftermarket activities were manipulative. Pursuant to that announcement, the Division of Market Regulation has been conducting an ongoing review of certain aftermarket practices (*e.g.*, overselling, syndicate covering transactions, and penalty bids), in order to decide whether the provisions of Regulation M adequately regulate syndicate underwriting practices and provide adequate protection to investors.

SEC Brief, Pet. App. 137a. In August 2002, the SEC Chairman requested the NYSE and NASD to appoint a "Blue Ribbon Panel" to investigate whether additional rulemaking is required. The SEC asked those SROs "to undertake a broader review of the IPO process to determine if the additional rulemaking being contemplated will be sufficient to strengthen the integrity of the offering process and to better protect investors." *Id.* at Pet. App. 139a. The NYSE/NASD IPO Advisory Committee issued its final report and recommendations concerning the hot IPO market

of the late 1990s and 2000 in May 2003. *See* SEC Letter Brief of March 21, 2005, Pet. App. 194a. And, on October 13, 2004, the SEC proposed amendments to Regulation M that, among other things, would add a new Rule 106 to expressly prohibit distribution participants, issuers, and their affiliated purchasers, directly or indirectly, from demanding, soliciting, attempting to induce, or accepting from their customers any consideration in addition to the stated offering price of the security. *See* Securities Exchange Act Release No. 50831 (December 9, 2004), 69 FR 75774 (December 17, 2004), SEC Letter Brief of March 21, 2005, Pet. App. 194a-195a.

Respondents assume that the SEC cannot authorize certain conduct they have challenged. But, as the district court below wrote,

> [U]nder the broad exemptive powers of the Exchange Act, the SEC has the power to permit a national securities association or exchange to fix any commission or fee structure it sees fit, or to permit certain types of discrimination in the imposition of commissions or fees. Consequently, the SEC, and by extension, the NASD, may permit the conduct related to commission practices alleged in this case.

Pet. App. 108a-109a (footnote omitted) (citing, *inter alia*, 15 U.S.C. § 78mm ("The Commission ... may conditionally or unconditionally exempt any person, security or transaction, or any class or classes of persons, securities, or transactions, from any provision or provisions of [the Exchange Act] or of any rule or regulation thereunder.")). *See also* SEC Letter Brief of March 21, 2005 (the SEC "has broad authority over the registered securities offering process, including authority to permit at least some agreements among underwriters that

can have the effect of *increasing* the aftermarket price over the price that would prevail in the absence of those agreements ...") (Pet. App. 189a) (emphasis supplied).

Even assuming, *arguendo*, respondents were correct that there is behavior that is beyond the power of the SEC to expressly authorize, it is not possible to define that core with any precision, and the core itself may shift, expand, or contract over time as the SEC refines its regulatory thinking and applies its judgment to specific facts. Certainly an antitrust court, at the pleading stage of litigation, when confronted with a somewhat vague and general complaint, cannot make secure judgments about whether challenged conduct lies clearly within, or clearly without, that core. Unless implied immunity attaches to the zone of activity (such as the alleged conduct challenged by respondents) regulated by the SEC, defendants will be exposed to antitrust lawsuits and potential treble damages for conduct that, if evaluated by the SEC on a full record, might be found to be permissible. Because immunity typically attaches at the motion to dismiss stage, *see Behrens v. Pelletier*, 516 U.S. 299, 308 (1996), antitrust courts, if not barred from doing so by this Court, will in many cases permit claims to proceed to summary judgment or trial based on conduct that may be permissible under SEC regulations, current or future. This result would effectively vitiate the implied immunity that otherwise would, and should, attach.

The Court need not look at the SEC's broad, general regulatory powers and embrace the pervasive regulation theory of implied immunity to reach this conclusion. Rather, the Court need only observe that the SEC has the power under Section 9(a)(6) of the Exchange Act, 15 U.S.C. § 78i(a)(6), to prohibit or allow transactions intended to fix or stabilize securities prices, and that it has the power under Section 9(a)(2) of the Exchange Act, 15 U.S.C. § 78i(a)(2), to define prohibited trading practices intended to raise or

depress prices. Given the fact-intensive inquiry necessary to determine whether a particular practice, in its full factual context, falls within Section 9(a)(2), or within Section 9(a)(6), or both,[4] and given the SEC's ongoing consideration of IPO communications practices and the possibility it may through additional regulation alter the lines being drawn, "allowing an antitrust lawsuit to proceed would conflict with Congress' implicit determination that the SEC should regulate the alleged anti-competitive conduct." *Friedman*, 313 F.3d at 801.

As the United States noted in its *amicus curiae* brief, a related but distinct point is that "a complaint's generalized allegations of conduct prohibited under the regulatory scheme should not preclude dismissal on immunity grounds if the complaint's allegations to that effect ultimately rest on collaborative activities that are either permitted under the securities laws or inextricably intertwined with such permitted activities, because such conduct is impliedly immune from antitrust liability." U.S. Cert. Br. at 8. Stated otherwise, implied immunity "encompasses activities that are directly related to and cannot practically be separate from authorized conduct." *Id.* at 11, citing *NASD*, 422 U.S. at 733-34. Thus, while the analysis in the above few paragraphs focuses on the inherent problem in determining at the pleading stage whether activity falls within or without the nuanced and evolving borders of SEC approval, the point here is that where core conduct impermissible under securities law is inextricably intertwined with other conduct that is permitted by the SEC, all of the conduct falls within the field of implied immunity.

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[4] It is not at all obvious, in the absence of a full factual record, whether a particular practice is intended to, and has the effect of, merely fixing or stabilizing securities prices, or whether it is intended to, and has the effect of, raising securities prices.

In addressing the problem of inextricable intertwinement, the United States proposed that the district court allow the respondents an opportunity to re-plead their complaint in order to determine whether they can avoid the problem. *See* U.S. Cert. Br. at 13-15. We respectfully submit that leave to amend would not be appropriate here. In this case, the district court could only decide that the activities forbidden by the SEC are inextricably intertwined with the book-building and associated IPO activities permitted by the SEC. As the SEC has written, the "syndicate underwriting of public offerings inherently involves agreements and joint actions among potential competitors, including agreements about price, that, but for the securities regulatory regime, would raise substantial antitrust concern." SEC Letter Brief of March 21, 2005, Pet. App. 192a. Here, the activities respondents challenge that they assert is beyond the power of the SEC to expressly approve are *necessarily* intertwined with "agreements and joint actions" between and among IPO syndicate members to build the book. Therefore, they cannot be disaggregated and challenged in a regulatory vacuum. Implied immunity necessarily attaches.

II. THROUGH THE SECURITIES LAWS AND THE SEC, CONGRESS HAS ENACTED A ROBUST SYSTEM TO REGULATE THE CONDUCT AT ISSUE HERE.

A. The Securities Laws, The SEC's Rule-Making, And The NASD's Rules Establish A Comprehensive Scheme To Regulate All Aspects Of The IPO Process.

Congress has granted the SEC broad general authority to regulate the allocation of IPO shares and underwriter commission practices through: (1) the Securities Act, under which the Commission regulates the offering process; (2) the

Exchange Act, under which the Commission defines and regulates manipulative acts in connection with the purchase or sale of securities; and (3) its reservoir of rulemaking authority over SROs. Taken together, these numerous requirements form a robust scheme of regulation that is continually evolving. The legislation and regulation covering the IPO process are spelled out in detail *supra* at Section I. Certain points in that discussion bear amplification here.

First, Congress – through the securities laws and its endorsement of the SEC's rule-making powers – has created a complete scheme to regulate stabilization and manipulation. The SEC has traditionally recognized certain "stabilizing" activities as legitimate and permissible under Section 9(a)(6) of the Exchange Act and SEC Rule 10b-1, 17 C.F.R. § 240.10b-1.

Second, Congress has entrusted the SEC with regulating underwriter compensation in addition to its efforts to regulate price stabilization. Under the Exchange Act, Congress empowered the SEC to supervise commission rates. *Gordon*, 422 U.S. at 690-91. Pursuant to this authority, the SEC requires underwriters to disclose their compensation and the amount of discounts and commission to be paid to the underwriter in connection with an IPO. 17 C.F.R. § 229.508(e). The SEC has allowed NASD rules in turn to define what constitutes underwriter compensation and to limit the amount of compensation underwriters may receive from issuers. NASD Rule 2710. The NASD has also adopted rules, approved by the SEC, that govern the fairness of and disclosures regarding underwriter commissions charged to customers and that provide the factors that underwriters must consider in setting their compensation. NASD Manual, IM-2440.

Third, the securities laws and the SEC's rules thereunder extensively regulate the "syndicate" process and

communications between syndicate members and their customers.[5] Indeed, the SEC has "power to regulate all aspects of the syndicate system." 15 U.S.C. § 77b(a)(3). For example, the Securities Act and rules adopted and implemented by the SEC under its grant of power impose restrictions on the IPO process. Section 5 of the Securities Act, 15 U.S.C. § 77e, imposes restrictions on non-exempt offerings of securities, including prohibitions on offers before a registration statement is filed, as well as limitations on oral and written communications with potential buyers after the registration statement is filed but before it becomes effective. Section 2(a)(3) excludes from those offering restrictions certain communications, including preliminary negotiations or agreements between an issuer and any underwriter. 15 U.S.C. § 77b(a)(3). However, SEC Rule 134 under the Securities Act permits broker-dealers to collect from potential buyers "indications of interest" in an IPO prior to its issuance. 17 C.F.R. § 230.134(d). In addition to the Securities Act and the rules prescribed by the SEC thereunder, the NASD comprehensively and actively regulates syndicates, including their formation, communications among members, commission structure, allocation of securities and fee arrangements. For example, NASD Rule 2110 and interpretation IM-2110-1 require all participants in an offering syndicate to make bona fide public distributions, and prohibit them from either withholding securities for their own benefit or using an allocation of securities to reward persons for future business.

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[5] The "Papilsky Release" (Exchange Act Release No. 17371, 21 S.E.C. Dkt. 930 (Dec. 12, 1980) provides an overview of the syndicate system and describes the broad discretionary authority typically granted to the managing underwriter by the "agreement among underwriters ... that establishes the obligations of each [syndicate] member").

B. Plaintiffs' Antitrust Allegations Are A Thinly Veiled Attempt To Avoid The Rigorous Pleading And Culpability Standards Under The Securities Laws.

Allowing this suit to proceed under the antitrust laws will thwart Congress' clearly expressed intent to reduce abusive "strike suits" under the securities laws. More than 300 consolidated actions have been filed under the securities laws concerning the conduct alleged here. *See In re Initial Pub. Offering Sec. Litig.*, 471 F.3d 24, 27 (2d Cir. 2006). These lawsuits – many brought by the same plaintiffs' lawyers involved here – are premised on allegations of tie-in arrangements, underwriter compensation, and analyst reports. *Id.* at 27-28.

These lawsuits allege violations of Section 10(b) of the Exchange Act and Rule 10b-5 thereunder, and are accordingly subject to rigorous scrutiny under the Private Securities Litigation Reform Act of 1995 ("Reform Act") and the Securities Litigation Uniform Standards Act of 1998 ("SLUSA"). *See* 15 U.S.C. § 78u-4(b). Through the Reform Act, Congress sought to reduce the volume of abusive federal securities litigation through heightened pleading standards, the loss causation requirement, the automatic stay of discovery, and procedural limits on maintenance of class actions. *See* 15 U.S.C. § 78u-4. *See, e.g., Dura Pharmaceuticals, Inc. v. Broudo*, 125 S. Ct. 1627 (2005) (re loss causation); *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, No. 06-484 (U.S. *cert.* granted Jan. 5, 2007) (re heightened pleading requirements). In a joint statement, managers from the House and Senate declared that "Congress has been prompted by significant evidence of abuse in private securities lawsuits to enact reforms to protect investors and maintain confidence in our capital markets." H.R. Conf. Rep. 104-369, at 31. The managers observed that plaintiffs routinely were filing lawsuits "against issuers of securities

and others whenever there [was] a significant change in an issuer's stock price, without regard to any underlying culpability of the issuer, and with only faint hope that the discovery process might lead eventually to some plausible cause of action[.]" *Id.* They recognized that plaintiffs, by targeting "deep pocket defendants," could misuse the discovery process "to impose costs so burdensome that it [was] often economical for the victimized party to settle[.]" *Id.*

When some members of the plaintiffs' bar attempted to avoid the Reform Act by filing securities suits in state rather than federal courts, Congress enacted SLUSA. *See Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Dabit*, 125 S. Ct. 1503, 1511 (2006). It provides that no "covered class action" based on state law and alleging "a misrepresentation or omission of a material fact in connection with the purchase or sale of a covered security" "may be maintained in any State or Federal court by any private party." 15 U.S.C. § 78bb(f)(1)(A).

If this Court were to allow this antitrust suit to go forward, it will have effectively abrogated Congress' explicit protections afforded to public companies under the Reform Act and SLUSA.

III. APPLYING THE ANTITRUST LAWS HERE WOULD RESULT IN OVERREGULATION AND OVERDETERRENCE IN THE U.S. CAPITAL FORMATION PROCESS.

Congress has instructed that whenever the SEC engages in rulemaking pursuant to "the public interest," the Commission "shall also consider, in addition to the protection of investors, whether the action will promote efficiency, competition, and capital formation." 15 U.S.C. § 77b(b). Congress charged the Commission with the responsibility of

balancing these potentially conflicting goals. The Second Circuit's decision threatens to undermine the Commission's balancing duties by permitting the potential for treble damages to impede conduct regulated by the Commission in the capital formation process.

The danger of this approach is "overdeterrence, *i.e.*, the possibility that severe antitrust penalties will chill wholly legitimate business arrangements." *Texas Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 637 (1981) (internal quotations omitted). *See also* Herbert Hovenkamp, *Antitrust Violations in Securities Markets*, 28 J. CORP. L. 607, 629 (2003) ("treble damages ... makes no sense when applied to public acts where efficiencies and anticompetitive effects have to be weighed against each other before antitrust legality can be known"). As the Commission notes, Respondents' position "threatens the syndicate offering system because mere participation in a syndicate could be construed to be sufficient, without more, to uphold a finding of an antitrust violation against all the participants." SEC Brief, Pet. App. at 155a. *See also id.* at 193a-194a (Commission noting that "fear of potentially crippling treble damages awards could over-deter conduct that would serve the interests of the markets and the capital formation process").

A. Antitrust Regulation Would Improperly Hinder The Ability Of U.S. Equity Capital Markets To Compete With Foreign Markets.

Any threat to the proper functioning of U.S. equity capital markets must be taken most seriously, since such markets constitute "the principal vehicle through which companies raise and price their capital." Interim Report of the Committee on Capital Markets Regulation, at x (2006). The threat comes at a time when the United States is at an

increasingly competitive disadvantage compared to its foreign counterparts with respect to capital-raising activities. For example, the United States' share of global IPOs (*i.e.*, IPOs done outside a company's home country) in terms of value declined from 50 percent in 2000 to five percent in 2005. *Id.* ("Measured by number of IPOs, the decline is from 37 percent in 2000 to 10 percent in 2005."). Other estimates indicate that in 2000, nine out of every ten dollars raised by foreign companies were raised in the U.S., whereas in 2005, the reverse held true. *See* Craig Karmin & Aaron Lucchetti, *New York Loses Edge in Snagging Foreign Listings*, Wall St. J., at C1 (Jan. 26, 2006). Some have even expressed concern that London will eventually displace New York as the world's financial capital. *See* Charles E. Schumer and Michael R. Bloomberg, *To Save New York, Learn From London*, Wall St. J., at A18 (Nov. 1, 2006) (in 2005, only one of the top 24 IPOs was registered in the U.S.). *See also* Karmin and Luchetti, *supra*, at C1 ("In 2005, 13 companies priced new stock offerings in New York ... [b]y contrast, in London and Luxembourg, 48 companies sold their new shares ...").

The precipitous decline in the U.S.'s share of global capital-raising activities is principally attributable to the burdensome regulatory requirements and costly litigation encountered in the U.S. market. Concern about U.S. overregulation is particularly prevalent among companies based in important growing and emerging markets. *See* Michelle Tsai and Lynn Cowan, *IPO Outlook: Chinese IPOs Stick Close to Home – Not Many Firms Make Debut in U.S. Amid Lawsuit Fears, Costs, Strict Regulation*, Wall St. J., at C4 (Mar. 20. 2006) ("Even with China's expanding economy, [investors] aren't seeing many new Chinese stocks listing on U.S. exchanges, and the ones that do are small fry compared with what trades in Hong Kong."). Over the last two years, U.S. stock exchanges have already experienced a decline in profitable and attractive Chinese investments. *See*

id. ("Since 2004, when 10 U.S.-listed Chinese IPOs raised a total of $3.93 billion, both the number and size of listings have declined ..."). As SEC Commissioner Paul Atkins notes, "[l]itigation risks and burdensome regulations ... lessen the international appetite for our capital markets." Paul Atkins, *A Serious Threat to Our Capital Markets,* Wall St. J. (June 10, 2006). Foreign companies have recognized that litigation in the U.S. is "more intrusive, more time consuming, and more costly than litigation in other countries." Jill E. Fisch, *Imprudent Power: Reconsidering U.S. Regulation of Foreign Tender Offers*, 87 Nw. U. L. REV. 523, 531 (Winter 1993). Indeed, from 1997 to 2005, U.S. securities class actions jumped in value from $150 million to $9.6 billion. *See* Schumer, *supra,* at A18.[6]

The Second Circuit's decision, if upheld, would impose an even further drag on U.S. equity capital markets by adding antitrust suits to an already burdensome regulatory and litigation environment. Unlike securities suits, antitrust claims raise the potential for treble-damage recovery and are less susceptible to early dismissal relative to securities actions because plaintiffs are not subjected to the Reform Act's heightened pleading requirements and other provisions designed to prevent abusive litigation. *See* Richard Liebeskind, Bryan R. Dunlap & Gena Chieco, *SEC, Antitrust Division May Square Off Over Jurisdiction*, Mondaq, at *1 (Aug. 3, 2006). The specter of treble damages will force market participants to "focus on avoiding antitrust liability, as opposed to a more constructive focus on complying with securities laws." *Id.*; *see also* Atkins, *supra* (noting that antitrust class actions would mire a U.S. system focused on delivering "IPOs efficiently and effectively to the market"). This in turn increases the costs of capital; the likely result

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[6] As noted above, more than 300 consolidated actions have been filed under the securities laws concerning the conduct alleged here. *See In re Initial Pub. Offering Sec. Litig.*, 471 F.3d 24, 27 (2d Cir. 2006).

will be fewer IPOs with some IPOs not occurring at all. *See* Brief of Securities Industry Association, Chamber of Commerce of the United States of America, and the Bond Market Association as Amici Curiae in Support of Petition for Certiorari, at 17 (April 2006). Importantly, the ultimate cost is to investors and reflects the very antithesis of antitrust law – *i.e.*, fewer investors will have the opportunity to receive shares. *Id.*[7]

B. The SEC, As An Active And Robust Regulatory Agency, Is Best Suited To Regulate The U.S. Capital Formation Process.

The Second Circuit's decision fails to adequately consider the costs and benefits of imposing antitrust regulation over capital formation activities. The Second Circuit effectively permits a lay jury to usurp the Commission's duty to regulate the capital formation process. This not only conflicts with the Commission's congressional mandate, but eviscerates the value inherent in a regulatory agency with substantial institutional experience and expertise in securities regulation. While the Commission draws on its experiences over time to carefully tailor enforcement objectives and remedies, the antitrust law's single-minded focus on competition and the prospect for treble damages can lead to confusion and market disruption. *See* Atkins, *supra*

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[7] Further, the scope of parties adversely affected by the Second Circuit's decision would extend beyond the members of the syndicate. *See id.* at 3 n.2 ("American firms raise capital as well through public offerings of debt and of equity subsequent to the IPO .... The effect of the panel's decision therefore will not be limited to IPOs but will extend to many other securities offerings."). *See also* Karmin and Lucchetti, *supra*, at C1 (the attractiveness of foreign capital markets "could mean that European individual investors have greater opportunities to invest directly in the best foreign companies of the future, whereas U.S. individual investors have fewer chances to do so").

("An awkward antitrust overlay could disable the ... finely tuned regulatory framework [of the Commission]."). As one prominent antitrust scholar put it:

> Once regulation of an industry is entrusted to jury trials, the outcomes of antitrust proceedings will be inconsistent with one another as well. The agency, by contrast, can generally be expected to make and enforce its own mandates consistently. In all events, the issue is not whether the agency has actually passed judgment on the practice, but whether it is competent to do so and likely to do so if asked. In virtually all such cases the regulatory agency has the clear comparative advantage over a court of general jurisdiction ....

Hovenkamp, *supra*, at 629 (2003). As the D.C. Circuit has held, "the tendency in antitrust adjudication to view business relationships in the black and white terms of legality or illegality, based solely on their competitive or anticompetitive impact, has no place" in evaluating SEC decisions. *Bradford Nat'l Clearing Corp. v. SEC*, 590 F.2d 1085, 1104 (D.C. Cir. 1978).

Where, as here, a robust – and active – regulatory regime exists to address the conduct at issue, the value in exposing parties to antitrust liability is even harder to justify. The Commission has already stated that the challenged practices "fall within the very heart of the Commission's regulatory authority over underwriting syndicates ... and they are comprehensively regulated." SEC Brief, Pet. App. at 127a. The Commission is also "actively pursuing comprehensive regulatory responses to those concerns, including possible enforcement actions and rulemaking." *Id.* at 128a. In this context, the questions are two-fold:

> First, how well is the regulatory enterprise itself doing its job of identifying and controlling competitive harms. Second, how much confidence do we have that application of the antitrust laws will improve competition in the situation at hand.

Herbert Hovencamp, THE ANTITRUST ENTERPRISE, at 237 (2005). As discussed above, *see supra*, at Section II, the Commission not only has the authority to address the underlying conduct at issue here, but must consider the competitive effects in crafting regulatory responses thereto. Further, far from standing idly by, the Commission is "actively" executing its statutory duties with respect to the underwriting practices that respondents challenge. As in *Trinko*, 540 U.S. at 411-15, this Court should conclude that the Commission is "an effective steward of the antitrust function" and that exposure to antitrust liability would not provide benefits sufficient to outweigh the potential detriment to the proper functioning and competitiveness of U.S. capital markets.

CONCLUSION

For the reasons set forth above, the decision of the Court of Appeals should be reversed.

Respectfully submitted,

DANIEL J. POPEO
RICHARD A. SAMP
WASHINGTON LEGAL FOUNDATION
2009 Massachusetts Ave, N.W.
WASHINGTON, D.C. 20036
(202) 588-0302

JAMES A. MEYERS
Counsel of Record
GARRET G. RASMUSSEN
ANTONY P. KIM
ORRICK, HERRINGTON & SUTCLIFFE LLP
3050 K Street, N.W.
Washington, D.C. 20007
(202) 339-8400

HOWARD M. ULLMAN
ERIN L. BANSAL
CATHY LUI
ORRICK, HERRINGTON & SUTCLIFFE LLP
405 Howard Street
San Francisco, CA 94105
(415) 773-5700

DANIEL TYUKODY
ORRICK, HERRINGTON & SUTCLIFFE LLP
777 South Figueroa Street
Suite 3200
Los Angeles, CA 90017
(213) 612-2020

Counsel for Amicus Curiae Washington Legal Foundation

January 22, 2007

(27)

No. 05-1157

In the Supreme Court of the United States

CREDIT SUISSE SECURITIES (USA) LLC, ET AL.,

Petitioners,

v.

GLEN BILLING, ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

JOINT APPENDIX

STEPHEN M. SHAPIRO
Counsel of Record
MAYER, BROWN, ROWE & MAW LLP
1909 K Street, N.W.
Washington, D.C. 20006
(202) 263-3000
Counsel for Petitioners

CHRISTOPHER LOVELL
Counsel of Record
LOVELL STEWART & HALEBIAN LLP
500 Fifth Avenue
New York, NY 10110
(212) 608-1900
Counsel for Respondents Glen Billing, et al.

RUSSEL H. BEATIE
Counsel of Record
BEATIE AND OSBORN LLP
521 Fifth Avenue, 34th Floor
New York, NY 10175
(212) 888-9000
Counsel for Respondent Milton Pfeiffer

PETITION FOR CERTIORARI FILED MARCH 8, 2006
CERTIORARI GRANTED DECEMBER 7, 2006

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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

In re Initial Public Offering Antitrust Litigation

No. 01 Civ. 2014 (WHP)

RELEVANT DOCKET ENTRIES

No.	Date	General Description
1	03/09/01	Class Action Complaint [*Billing* v. *Credit Suisse First Boston Corp.*]
44	10/29/01	Case Management Order No. 1, the actions 01 Civ. 2014 et al. are consolidated for all purposes pursuant to the provisions of Rule 42 of the FRCP. This Court designates the following firms to serve as the Plaintiffs' Executive Committee in the litigation: Lovell & Stewart LLP; Milberg Weiss Bershad Hynes & Lerach LLP, Sirota & Sirota LLP; Schiffrin & Barroway LLP; and Wolf Haldenstein Adler Freeman & Herz, LLP.
57	01/02/02	Amended Class Action Complaint by Glen Billing et al.
93	05/23/02	Order granting Milton Pfeiffer's motion to assert a claim under the Robinson-Patman Act; order granting defendants' motion to stay all discovery
95	05/28/02	Notice of Joint Motion by Credit Suisse Corp. et al. to dismiss consolidated amended complaint

No.	Date	General Description
96	05/28/02	Joint Memorandum of Law by Credit Suisse Corp. et al. in support of joint motion to dismiss the federal law claims
97	05/28/02	Declaration of Jon R. Roellke in support of defendants' joint motion to dismiss the federal law claims
98	05/28/02	Joint Memorandum of Law by Credit Suisse Corp. et al. in support of joint motion to dismiss the state law claims
99	05/28/02	Declaration of Fraser L. Hunter, Jr. in support of defendants' joint motion to dismiss consolidated amended complaint
103	07/08/02	Memorandum of Law by Glen Billing in opposition to joint motion to dismiss the state law claims
105	07/08/02	Affidavit of J. Douglas Richards in opposition to defendants' joint motion to dismiss the state law claims
106	07/08/02	Response by Glen Billing to joint motion to dismiss the federal law claims
107	07/08/02	Declaration of Cole Clayton in opposition to defendants' joint motion to dismiss the federal law claims
110	07/09/02	Memorandum of Law by Milton Pfeiffer in opposition to joint motion to dismiss consolidated amended complaint
102	07/10/02	Transcript of proceedings held on May 16, 2002

No.	Date	General Description
117	07/25/02	Plaintiffs' corrected response to motion to dismiss the federal law claims
113	08/07/02	Joint Reply Memorandum by Credit Suisse Corp. et al. in support of joint motion to dismiss consolidated amended complaint
114	08/07/02	Joint Reply Memorandum by Credit Suisse Corp. et al. in support of joint motion to dismiss consolidated amended complaint
115	08/07/02	Declaration of Robert B. McCaw in support of defendants' joint motion to dismiss consolidated amended complaint
142	07/22/03	Memorandum of Law of the SEC as amicus curiae [filed 12/20/02]
124	12/20/02	Memorandum of the United States as amicus curiae
128	01/24/03	Letter by Glen Billing regarding new authorities
129	01/24/03	Letter by SEC regarding Second Circuit decisions that support the SEC's legal arguments and recent enforcement action filed by the SEC
133	01/28/03	Corrected Letter by Plaintiffs' Executive Committee addressing implied immunity in light of two recent Second Circuit decisions
138	02/04/03	Letter by Credit Suisse Corp. et al. regarding immunity argument

No.	Date	General Description
134	02/05/03	Letter by Milton Pfeiffer concerning recent decisions
137	02/05/03	Letter by State of New York as amicus curiae regarding antitrust immunity issue
139	02/13/03	Letter by Credit Suisse Corp. et al. responding to submission by State of New York
149	11/03/03	Memorandum and Order granting joint motion to dismiss consolidated amended complaint against all defendants with prejudice
150	11/05/03	Judgment dismissing this action on the grounds of implied immunity with prejudice as against all defendants; accordingly, the case is closed
151	11/18/03	Notice of Motion by Glen Billing to reconsider dismissal of the state law claims
152	11/18/03	Memorandum of Law by Glen Billing in support of motion to reconsider dismissal of the state law claims
154	12/02/03	Notice of Appeal by Glen Billing et al.
153	12/03/03	Notice of Appeal by Milton Pfeiffer et al.
155	12/03/03	Response by BancBoston Robertson et al. to motion for reconsideration
156	04/14/04	Order denying Sherman Act Plaintiffs' motion for partial reconsideration of Court's 11/03/03 Memo. and Order

No.	Date	General Description
158	05/12/04	Amended Notice of Appeal by Glen Billing et al.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

Milton Pfeiffer, et al., Plaintiffs,

v.

Credit Suisse First Boston Corp. et al., Defendants.

No. 01 CV 11420

RELEVANT DOCKET ENTRIES

No.	Date	General Description
1	12/12/01	Class Action Complaint
	12/12/01	Case referred to Judge William H. Pauley III as possibly related to 1:01cv2014
	12/27/01	Case accepted as related to 1:01cv[2014]
	01/29/02	Case closed

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Glen Billing, et al., Plaintiffs-Appellants,

v.

Credit Suisse First Boston Ltd., et al., Defendants-Appellees.

Nos. 03-9284, 03-9288

RELEVANT DOCKET ENTRIES

Date	**General Description**
05/27/04	Record on appeal index in lieu of record filed
06/23/04	Appellant Milton Pfeiffer et al., brief filed
06/23/04	Appellants Glen Billing et al., brief filed
06/23/04	Appellants Lennard Steinberg et al., special appendix filed
06/23/04	Appellants Lennard Steinberg et al., joint appendix filed
06/30/04	Amicus Curiae State of New York, brief filed
07/30/04	Appellees Citigroup Global Markets, Inc. et al., brief filed
08/20/04	Appellant Milton Pfeiffer et al., reply brief filed
09/01/04	Appellants Glen Billing et al., corrected reply brief filed
12/13/04	Case heard before Judges Oakes, Katzmann, and Wesley
01/05/05	Letter inviting the SEC to address, *inter alia*: (1) Does the SEC have the authority, under its ena-

Date	General Description
	bling statutes, to allow underwriters to engage in the alleged conduct, including a conspiracy to inflate aftermarket securities prices? (2) If not, how would judgment for plaintiffs in this case impede the SEC's ability to regulate or exempt from regulation any underwriters, securities, or transactions? (3) In light of your answers to (1) and (2), are defendants-appellees entitled to implied antitrust immunity in this action?
03/23/05	Amicus Curiae SEC post-argument letter brief filed
03/28/05	Letter inviting the United States Department of Justice Antitrust Division to address, *inter alia*: (1) Does the SEC have the authority, under its enabling statutes, to allow underwriters to engage in the alleged conduct, including a conspiracy to inflate aftermarket securities prices? (2) If not, how would judgment for plaintiffs in this case impede the SEC's ability to regulate or exempt from regulation any underwriters, securities, or transactions? (3) In light of your answers to (1) and (2), are defendants-appellees entitled to implied antitrust immunity in this action?
05/06/05	Amicus Curiae United States Department of Justice Antitrust Division, letter brief filed
05/13/05	Appellant Local 144 Nursing et al., Rule 28(j) letter received
05/20/05	Letter received from Defendants-Appellees regarding joint submission of letter in response to the SEC and DOJ letter briefs
05/26/05	Letter received from Russel H. Beatie responding to defendants-appellees' letter of 05/20/05

Date	General Description
07/27/05	Letter received from Christopher Lovell in response to appellees' letter dated 05/20/05
09/28/05	Judgment of the district court is vacated and remanded
11/02/05	Appellees' petition for rehearing and petition for rehearing en banc filed
01/12/06	Order denying petition for rehearing by Appellees Goldman, Sachs et al.
03/09/06	Order granting motion to stay the mandate by Appellees Merrill Lynch, Pierce, Fenner & Smith Inc. et al.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------X
IN RE INITIAL PUBLIC OFFERING:
ANTITRUST LITIGATION : 01 Civ. 2014 (WHP)
----------X

CONSOLIDATED AMENDED CLASS ACTION COMPLAINT

LOVELL & STEWART, LLP
500 Fifth Avenue
New York, New York 10110
(212) 608-1900

MILBERG, WEISS BERSHAD HYNES & LERACH LLP
One Pennsylvania Plaza
New York, New York
10119-0165
(212) 594-5300

SCHIFFRIN & BARROWAY, LLP
Three Bala Plaza East
Suite 400
Bala Cynwyd, PA 19004
(610) 667-7706

SIROTA & SIROTA LLP
110 Wall Street, 21st Floor
New York, New York 10005
(212) 425-9055

WOLF HALDENSTEIN ADLER FREEMAN & HERZ LLP
270 Madison Avenue
New York, NY 10016
(212) 545-4600

Plaintiff's Executive Committee
(Additional Counsel on Signature Page)

This is a class action alleging violations of federal and state antitrust laws. Plaintiffs make the following allegations upon information and belief based upon the investigation of their counsel, except as to the allegations specifically pertaining to plaintiffs and their counsel.

I. SUMMARY OF ALLEGATIONS

1. During the Class Period (as defined at ¶ 25), the defendants combined, conspired and agreed to require from customers consideration in addition to the underwriters' discount (the "anti-competitive charges") for allocations of shares of initial public offerings of certain technology-related companies (*see* Exhibit A hereto)[1] and to inflate the aftermarket prices for such Class Securities, in violation of Section 1 of the Sherman Antitrust Act, 15 U.S.C. § 1, and state antitrust laws.

2. These technology-related companies that issued the Class Securities did not sell directly to the public the shares of their initial public offerings ("IPOs") of common stock. Instead, such companies sold their IPO stock to intermediaries known as "underwriters." The underwriters sold 100% of such IPO stock to the public during the relevant period. They did so in combinations, or "syndicates," of underwriters.

3. During 1999-2000, one or more of the defendants was the lead underwriter(s) in approximately 90% of the dollar value of the IPOs of technology-related companies and approximately 87% of the dollar value of all equity IPOs. *See* ¶ 76 n. 3. The lead underwriter substantially controls an underwriting. By virtue of the facts alleged herein, the defendants dominated or had market power in the relevant market during the Class Period. *See* ¶¶ 75-78 *infra.*

4. As further described herein, pursuant to defendants' combination, conspiracy and agreement:

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[1] Exhibit A lists "Class Securities" and related information. [Exhibit omitted.]

(a) Each defendant required customers to pay to defendants the IPO price for the relevant Class Security plus additional anticompetitive charges. *See* ¶ 6 *infra*.

(b) Each defendant required customers to agree, in order to obtain IPO shares of Class Securities, to make "tie in purchases" of such Class Securities in the aftermarket at levels above the respective IPO prices. *See* ¶ 7 *infra*.

5. Defendants commonly organized themselves into groups—known as "syndicates"—to underwrite and market IPOs. Defendants abused the preexisting practice of combining into underwriting syndicates by implementing the unlawful agreement alleged herein through such syndicates, including through "road shows", other communications, information sharing, and other aspects and work of their underwriting syndicates as alleged at ¶¶ 51-59 *infra*. Indeed, various defendants jointly agreed upon the amounts, prices and/or timing of the tie-in purchases that various customers were required to make in order to receive allocations of shares of Class Securities on initial public offerings. Moreover, with respect to the Class Securities, defendants agreed to permit the lead underwriter in each syndicate to sell all of the shares being underwritten (if deemed beneficial to further the conspiracy to inflate the aftermarket prices or to receive the anticompetitive charges or otherwise), but to pay all underwriters in such syndicate even when they did not sell any of the Class Securities. This undisclosed "centralizing" agreement further enhanced defendants' market power.

6. Defendants' unlawful combination, conspiracy and agreement and their substantial market power enabled them to extract the anticompetitive charges from their customers and Class members. The defendants agreed that customers would be required to pay to the underwriters the public offering price plus the additional consideration of the anticompetitive charges for IPO shares of Class Securities. Defendants did not disclose these anticompetitive charges in prospectuses for Class Securities. The defendants agreed that such

anticompetitive charges could take several forms. These included non-competitively determined commissions on the purchase and sale of other securities, purchases of an issuer's shares in follow-up or "secondary" public offerings (for which the underwriters would earn underwriting discounts), commitments to purchase other, less attractive securities, or the laddered purchases described in the next paragraph. Pursuant to defendants' agreement, the amount of the required consideration was frequently based upon a percentage of the profits obtained by the customer in connection with the purchase of IPO shares.

7. The defendants leveraged their extensive market power by agreeing to require that, in order to obtain IPO shares of a Class Security, customers had to place bids for and/or purchase quantities of such Class Security in the aftermarket at prices above the IPO price in order to systematically and significantly inflate the after-market prices of IPOs—a practice known as "laddering." The laddered purchases were made at the direction of defendants (or their co-conspirators) for defendants' purpose of inflating the aftermarket prices of Class Securities in order to increase defendants' revenues. Specifically, the defendants' individual and collective revenue in connection with their underwriting activity depended, among other things, on the change in a stock's price shortly following the IPO. Through the laddering practices and other elements of their unlawful agreement, defendants did cause the prices of the Class Securities to trade at significantly inflated prices on the first day of trading and thereafter in the aftermarket until the practices were publicly disclosed. The result was that defendants significantly increased their underwriting market share and created billions of dollars of additional revenues for themselves that they would not have made in the absence of their unlawful agreement. *See* ¶ 74 *infra*.

8. These laddered purchases, other purchases made by defendants and their co-conspirators, other elements of de-

fendants' unlawful agreement, and the momentum of defendants' increasing market power had a cumulative effect on the relevant market. These factors and the defendants' increasing effectiveness began consistently to inflate the trading volume and prices of the Class Securities by substantial amounts. Between 1981 and 1996, the average price increase on the first day of trading of equity IPOs was approximately 8%. As the direct result and cumulative effect of defendants' implementation of their anticompetitive agreement, during the Class Period, the average price increase on the first day of trading in Class Securities was in excess of 60% and during 1999-2000 was in excess of 70%. Moreover, defendants' agreement caused more shares to be traded and attracted more trading interest for defendants' market-making operations on the first trading day and thereafter. From 1981 until 1996, the average volume of trades on the first day of trading of IPOs in general was roughly one-third the number of shares publicly offered. This volume dramatically increased during 1999-2000.

9. Plaintiffs and Class members were injured in their business or property by defendants' violation of the antitrust laws in that plaintiffs and Class members paid the anticompetitive charges and inflated aftermarket prices caused by such unlawful agreement.

II. JURISDICTION AND VENUE

10. Plaintiffs bring this action under Section 4 of the Clayton Act, 15 U.S.C. §§ 15, for treble damages to recover for injuries sustained by plaintiffs and Class members arising from violations by defendants of the federal antitrust laws, including Section 1 of the Sherman Antitrust Act, 15 U.S.C. § 1. This Court has supplemental jurisdiction over the state law claims alleged in the second and third claims for relief pursuant to 28 U.S.C. § 1367(a).

11. Venue is proper in this judicial district pursuant to 15 U.S.C. § 22 and 28 U.S.C. § 1391(b) and (c), because

each of the defendants resides, is licensed to do business or maintains an office and/or the claims arose in this District. Many of the wrongful acts alleged herein took place in this District.

12. N.Y. Gen. Bus. Law § 340 applies to the claims of all Class members. All but one of the named defendants have their principal places of business in New York. The anticompetitive scheme of the defendants was conceived, developed, agreed to and deployed in and from New York. The bulk of the defendants' underwriting services in connection with the Class Securities was performed in New York. Many members of the Class also have additional state law claims under the laws of states in which they reside other than New York.

III. PLAINTIFFS

13. Except where otherwise alleged, each plaintiff identified below purchased, among others, the Class Securities identified below during the Class Period. Except where otherwise alleged, these purchases were made in the aftermarket at the inflated prices caused by defendants' conduct.

(a) Plaintiff Mita Aggarwal, a resident of New Jersey, and Mita Aggarwal IRA purchased Ariba, Inc. securities.

(b) Plaintiff Estelle L. Augustine, a resident of Ohio, purchased Marketwatch.com, Inc. securities.

(c) Plaintiff Tom Barnett, a resident of South Carolina, purchased Ariba, Inc. securities.

(d) Plaintiff Anupkumar Bhasin, a resident of Maryland, purchased Rediff.com India, Ltd. securities.

(e) Plaintiff Glen Billing, a resident of Texas, purchased Marimba, Inc. securities.

(f) Plaintiff Joe Braswell, a resident of Maryland, purchased PlanetRx.com Inc. securities.

(g) Plaintiff Troy Brooks, a resident of Alberta, Canada, purchased Wireless Facilities, Inc. securities.

(h) Plaintiff Anita Budich, a resident of Arizona, purchased VA Linux Systems, Inc. securities.

(i) Plaintiff Thomas E. Burke, a resident of Massachusetts, purchased Storagenetworks, Inc. securities from defendant Salomon Smith Barney, Inc. on June 30, 2000.

(j) Plaintiff Don K. Burris, a resident of Georgia, purchased MP3.com Inc. securities.

(k) Plaintiff Louis Capolino, a resident of New Jersey, purchased Global Crossing, Ltd. securities from defendant Salomon Smith Barney, Inc. on February 24, 1999 and on September 14, 1999.

(l) Plaintiff Jerry Cobb, a resident of Florida, purchased iVillage, Inc. securities.

(m) Plaintiff Max Cohen, a resident of New York, purchased Starmedia Networks, Inc. securities from defendant Salomon Smith Barney, Inc. on September 8, 2000.

(n) Plaintiff Ray L. Cox, a resident of Tennessee, purchased Freemarkets, Inc. and Ventro Corp. securities.

(o) Plaintiffs Buddy and Eileen Dukeman, residents of Pennsylvania, purchased Priceline.com securities.

(p) Plaintiff Joyce Dunn, a resident of California, purchased Global Crossing, Ltd. securities from defendant Morgan Stanley Dean Witter & Co. on January 26, 2000.

(q) Plaintiff David Federico, a resident of California, purchased Navisite, Inc. securities.

(r) Plaintiff Robert Grovich, a resident of California, purchased Corvis Corp. securities.

(s) Plaintiff Joe Goldgrab, a resident of New York, purchased Gadzoox Networks, Inc. securities.

(t) Plaintiff Bob Harper, a resident of Mississippi, purchased Rhythms Netconnections, Inc. securities.

(u) Plaintiff David Hoffman, a resident of California, purchased F5 Networks Inc. securities from defendant J.P Morgan Chase Securities (then Chase H&Q) on March 6, 7 and 10, 2000, and on April 14, 2000.

(v) Plaintiff Bruce J. Jiorle, a resident of New Jersey, purchased Internet Capital Group, Inc. securities.

(w) Plaintiff H. Wayne Jones is a resident of the State of Georgia. Mr. Jones purchased at artificially inflated prices the common stock of Ariba, Inc. after the IPO for that security.

(x) Plaintiff Susan Katz, a resident of New York, purchased Liberate Technologies, Inc. securities.

(y) Plaintiff Glenn Kerr, a resident of Maryland, purchased Calico Commerce, Inc. securities.

(z) Plaintiff Irving Lassoff, a resident of Pennsylvania, purchased Net2000 Communications, Inc. securities from defendant Morgan Stanley Dean Witter & Co. on November 30, 2000.

(aa) Plaintiff Roderick Lau, a resident of the city of Calgary, Alberta, Canada, purchased Netzero, Inc. securities.

(bb) Plaintiff Elizabeth Bates Lester, a resident of Michigan, and the Elizabeth Bates Lester Trust purchased Internet Capital Group, Inc. securities from defendant Merrill Lynch, Pierce, Fenner & Smith, Inc. on November 1, 1999.

(cc) Plaintiff James W. Lester, a resident of Michigan, and the James W. Lester Trust purchased Internet Capital Group, Inc. securities from defendant Merrill Lynch, Pierce, Fenner & Smith, Inc. on August 30, 1999, December 22, 1999, January 10, 20000, October 10, 2000, and November 10, 2000.

(dd) Plaintiff Solomon Lissanu, a resident of Virginia, purchased Netzero, Inc. securities.

(ee) Plaintiff Raymond Litwin, a resident of Maryland, purchased Opus360 Corp. securities.

(ff) Plaintiff Local 144 Nursing Home Pension Fund, located in New York, purchased Aether Systems, Inc. from defendant Robertson Stephens, Inc. on March 21, 2000; Extreme Networks Incorporated from defendant Robertson Stephens, Inc. on March 22, 2000 and October 13, 2000 and from defendant Morgan Stanley & Co., Incorporated on October 2, 2000; and Liberate Technologies from a predecessor entity of J.P. Morgan Chase & Co. on March 6, 2000.

(gg) Plaintiffs Michele and Bill Lucia, residents of New York, purchased 50 shares of Infonet Services Corp. common stock directly from defendant Merrill Lynch, Pierce, Fenner & Smith, Inc. ("Merrill Lynch") as part of the Infonet IPO. In connection with this allocation, defendant Merrill Lynch, the lead underwriter for that IPO, required that Mr. and Mrs. Lucia pay anticompetitive charges, and Mr. and Mrs. Lucia did pay the anticompetitive charges, in the forms of additional purchases of this security in the aftermarket, at inflated prices and at excessive commissions. Mr. and Mrs. Lucia purchased twenty-five shares of Buy.com Inc. common stock directly from defendant Merrill Lynch as part of the Buy.com Inc. IPO. In connection with this allocation, defendant Merrill Lynch, the lead underwriter for that IPO, required that Mr. and Mrs. Lucia pay anticompetitive charges, and Mr. and Mrs. Lucia did pay the anticompetitive charges, in the forms of additional purchases of this security in the aftermarket, at inflated prices and at excessive commissions.

(hh) Plaintiff Robert Malafronte, a resident of Illinois, purchased Commerce One, Inc. and Lante Corp. securities.

(ii) Plaintiff Binh Nguyen, a resident of Washington, purchased Internet Capital Group, Inc. securities.

(jj) Plaintiff David Pazarella, a resident of New York, purchased Calico Commerce, Inc. securities.

(kk) Plaintiff Demetrios Petratos, a resident of Louisiana, purchased Autoweb.com, Inc. securities.

(ll) Plaintiff Carlos Reeberg, a resident of Arizona, purchased VerticalNet, Inc. securities.

(mm) Plaintiff Hans Reihl, a resident of Berg, Germany, purchased Digimarc Corp. securities.

(nn) Plaintiff Norman Ross, a resident of Florida, purchased iBeam Broadcasting Corp. securities from defendant Morgan Stanley Dean Witter & Co. on September 22, 2000 and on December 1, 2000.

(oo) Plaintiff Rachel Schwartz, a resident of New York, purchased Multex.com Inc. securities.

(pp) Plaintiff Mark Sculnick, a resident of New York, purchased InterTrust Technologies Corp. securities.

(qq) Plaintiff Edward Seltzer, a resident of Nevada, purchased Net2Phone Inc. securities.

(rr) Plaintiff Kenneth Shives, a resident of Pennsylvania, purchased Ariba, Inc. securities.

(ss) Plaintiff Farideh Sigari, a resident of California, purchased Selectica, Inc. securities.

(tt) Plaintiff Efriam Simcha, a resident of New York, purchased Red Hat Inc., VA Linux Systems, Inc., Microstrategy, Inc. and Priceline.com Inc. securities.

(uu) Plaintiff Henry Sklanowsky, a resident of California, purchased Priceline.com securities.

(vv) Plaintiff Robert Tarantino, a resident of New York, purchased from defendant Credit Suisse First Boston Vitria Technology, Inc. securities on September 22, 1999, October 13, 1999, January 21, 2000, April 11, 2000, July 10, 2000 and July 13, 2000.

(ww)Plaintiff Enrico Tavani, a resident of Antibes, France, purchased Optio Software, Inc. securities.

(xx) Plaintiff Robert H. Thomas, a resident of Texas, purchased Internet Capital Group, Inc. securities.

(yy) Plaintiff Anthony Voto, a resident of New York, purchased Marimba, Inc. securities.

(zz) Plaintiff Heinz Wahl, a resident of Frankenthal, Germany, purchased Doubleclick, Inc. securities.

(aaa) Plaintiff Philip Warner, a resident of Massachusetts, purchased Wireless Facilities, Inc. securities.

(bbb) Plaintiff Matthew Weiner, a resident of New York, purchased Palm, Inc. securities.

(ccc) Plaintiff Michael Weiss, a resident of Michigan, purchased Merrill Lynch B2B Internet HOLDRs Depository Receipts.

(ddd) Plaintiff Ross Wiczer is a resident of the State of Maryland. Mr. Wiczer purchased at artificially inflated prices the common stock of Priceline.com, Inc. after the IPO for that security.

(eee) Plaintiff Bert Zauderer, a resident of Pennsylvania, purchased Merrill Lynch B2B Internet HOLDRs Depository Receipts.

(fff) Plaintiff Deming Zhous, a resident of Illinois, purchased Avici Systems, Inc. securities.

IV. DEFENDANTS

14. Defendant **BEAR, STEARNS & CO. INC.**, defined to include all predecessor entities, is a corporation organized and existing under the laws of the State of Delaware, with its principal place of business in New York, New York.

15. Defendant **CREDIT SUISSE FIRST BOSTON CORPORATION** ("CSFB"), defined to include all predecessor entities, including, but not limited to, Donaldson Lufkin & Jenrette Securities Corporation ("DLJ") and any related DLJ entities, is a corporation organized and existing

under the laws of the Commonwealth of Massachusetts, with its principal place of business in New York, New York.

16. Defendant **DEUTSCHE BANK ALEX. BROWN** ("Alex Brown"), defined to include all predecessor entities, is a corporation organized and existing under the laws of the State of Delaware, with its principal place of business in New York, New York.

17. Defendant **GOLDMAN SACHS & CO.** ("Goldman"), defined to include all predecessor entities, is a corporation organized and existing under the laws of the State of Delaware, with its principal place of business in New York, New York.

18. Defendant **J.P. MORGAN CHASE & CO.**, defined to include all predecessor entities, including, but not limited to, Hambrecht & Quist LLC ("H&Q") and any related H&Q entities, is a corporation organized and existing under the laws of the State of Delaware, with its principal place of business in New York, New York.

19. Defendant **LEHMAN BROTHERS, INC.**, defined to include all predecessor entities, is a corporation organized and existing under the laws of the State of Delaware, with its principal place of business in New York, New York.

20. Defendant **MERRILL LYNCH, PIERCE, FENNER & SMITH, INC.**, defined to include all predecessor entities, is a corporation organized and existing under the laws of the State of Delaware, with its principal place of business in New York, New York.

21. Defendant **MORGAN STANLEY & CO., INCORPORATED** ("Morgan Stanley"), defined to include all predecessor entities, including, but not limited to Morgan Stanley Dean Witter & Co. and related entities, is a corporation organized and existing under the laws of the State of Delaware, with its principal place of business in New York, New York.

22. Defendant **ROBERTSON STEPHENS, INC.** ("Robertson Stephens"), defined to include all predecessor entities, is a corporation organized and existing under the laws of the State of Delaware, with offices in New York, New York.

23. Defendant **SALOMON SMITH BARNEY, INC.**, defined to include all predecessor entities, is a corporation organized and existing under the laws of the Commonwealth of Massachusetts, with its principal place of business in New York, New York.

V. CO-CONSPIRATORS

24. Various investment banks and market makers, not named as defendants in this Complaint, participated in and knowingly and intentionally profited from the violations alleged herein and performed acts and made statements in furtherance thereof.

VI. CLASS ALLEGATIONS

25. Plaintiffs bring this action on behalf of themselves and all persons who between March 9, 1997 and December 6, 2000 (the "Class Period") purchased Class Securities on the initial public offering and paid the anticompetitive charges and/or purchased Class Securities in the aftermarket and were damaged thereby.[2]

26. Excluded from the Class are each defendant, any investment banks which participated as syndicate members in any of the Class Securities, and all co-conspirators and each of their respective officers and directors, members of their immediate families, their legal representatives, heirs, successors or assigns and any entity in which any of the defendants or any excluded person has a controlling interest. Also ex-

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[2] Plaintiffs reserve the right to amend, supplement or alter the definition of the Class in plaintiffs' class motion pursuant to Rule 23 of the Federal Rules of Civil Procedure.

cluded are all issuers of Class Securities and all officers, directors or affiliates of any issuers of the Class Securities.

27. Members of the Class are so numerous that joinder of all members is impracticable. While the precise number of members of the Class is unknown at this time, it is believed to number at least in the tens of thousands of members. Hundreds of millions of shares of Class Securities were sold by defendants to members of the Class during the Class Period.

28. Plaintiffs will fairly and adequately protect the interests of the members of the Class and have no interests which are contrary to or are in conflict with those of the Class that they seek to represent. Plaintiffs have retained competent counsel experienced in class action litigation of this type to protect the Class and prosecute this action vigorously.

29. Plaintiffs' claims are typical of the claims of the other members of the Class since all of their damages arise from and were caused by the same unlawful conduct engaged in by Defendants.

30. A class action is superior to other available methods, if any, for the fair and efficient adjudication of this controversy because, among other reasons, joinder of all members of the Class is impracticable. Furthermore, the expense and burden of individual litigation make it impracticable for the members of the Class individually to redress the wrongs done to them. Plaintiffs know of no difficulty that will be encountered in the management of this litigation that would preclude its maintenance as a class action.

31. Common questions of law and fact exist as to all members of the Class and predominate over any questions affecting solely individual Class members. Such questions include:

(a) whether defendants entered into the combination, conspiracy and agreement complained of herein;

(b) whether the alleged combination, conspiracy and agreement violated federal and state antitrust laws;

(c) whether the combination, conspiracy and agreement caused injury to the business or property of plaintiffs and the other members of the Class;

(d) the appropriate measure of damages; and

(e) whether plaintiffs and the other members of the Class are entitled to declaratory relief.

32. Because defendants have acted on grounds generally applicable to the entire Class, damages and declaratory relief are appropriate with respect to the Class as a whole.

VII. INTERSTATE TRADE AND COMMERCE, AND BACKGROUND

33. Each defendant has thousands of brokerage account customers who entrust it with various monies, properties and orders to buy securities. The customers, including plaintiffs and Class members, for whose business the defendants purportedly compete, are located throughout the United States and elsewhere. The orders and the transactions of plaintiffs and Class members in Class Securities were entered and made in interstate commerce. Defendants sold across state lines to Class Members many billions of dollars worth of Class Securities.

34. The orders and transactions of plaintiffs and Class Members include orders to buy shares in the initial public offering of or aftermarket for Class Securities.

35. IPOs are commonly conducted through investment banks as underwriters, including defendants.

36. In an IPO, underwriting investment banks typically purchase from an issuer its initial public offering of stock at a price agreed upon with the issuer. The underwriters also agree with the issuer: (a) to charge an agreed-upon underwriters' discount representing the underwriters' disclosed

compensation, and (b) to offer the entire issue of stock to the public at the sum of (1) the agreed-upon purchase price paid to the issuer, plus (2) the agreed-upon underwriters' discount and commission. This sum is the "IPO price."

37. Underwriter syndicates of investment banks developed from the need of bankers to pool capital resources in order to underwrite securities. This development was further necessitated by the passage of the Glass-Steagall Act. The conditions that justified combining into syndicates in order to underwrite IPO shares, however, no longer applied or became less pertinent by the mid-1990s due to changes in the net capital rules, dramatic increases in the capital of U.S. investment banks, and the relaxation (and eventual repeal) of Glass-Steagall.

38. Nonetheless, defendants still regularly combined with one another during the Class Period into underwriting syndicates. One or more of the defendants served as the lead or a lead underwriter of the underwriting syndicates for approximately 73% of the total dollar amount of all equity underwritings and 71% of the total dollar amount of technology-related IPOs during 1997. By virtue of their unlawful agreement alleged herein, defendants' comparable market share had grown to approximately 87% and 90%, respectively, by 1999-2000.

39. Defendants further concentrated their market power within the underwriting syndicates during the Class Period: all defendants reduced competition among themselves by agreeing that whichever of them was lead underwriter in a particular syndicate could itself distribute all the shares of each Class Security (if deemed beneficial to maximize the aftermarket prices of the Class Securities and the anticompetitive charges or for other advantages). Any member of the syndicate who did not sell the number of shares allocated to it as stated in the prospectus, or, indeed, any shares, nevertheless shared in the underwriters' discount. These procedures would be applicable reciprocally in each

syndicate for which one of the defendants was a lead underwriter. Defendants further abused their combination in syndicates by jointly concealing the centralizing agreement from customers.

40. Defendants worked individually and in concert among themselves and with co-conspirator market-makers to inject demand into the market for Class Securities and to inflate aftermarket prices. Through the foregoing steps, their unlawful agreement and other conduct, defendants increased their power in and dominated the relevant market. *See* ¶ 78 *infra*.

41. Beginning prior to March 9, 1997, and throughout the Class Period, defendants combined, conspired and agreed to require from customers the anticompetitive charges and to inflate the aftermarket prices for the Class Securities.

42. The anticompetitive charges caused the actual consideration paid to defendants for Class Securities to be greater than the IPO price and, correspondingly, inflated defendants' revenues. The defendants agreed that such anticompetitive charges could take several forms. These included non-competitively determined commissions on the purchase and sale of other securities, purchases of an issuer's shares in follow-up or "secondary" public offerings (for which the underwriters would earn underwriting discounts), commitments to purchase other, less attractive securities, or the laddered purchases described herein. Pursuant to defendants' agreement, the amount of the required consideration was frequently based upon a percentage of the profits obtained by the customer in connection with the purchase of IPO shares. Also, as defendants' combination and conspiracy evolved and became more effective, defendants' demands on their customers increased.

43. Defendants' combination, conspiracy and agreement unreasonably restrained interstate trade and commerce by inflating defendants' charges and revenues and the after-

market prices for Class Securities in billions of dollars worth of interstate transactions.

VIII. THE MAKING AND IMPLEMENTATION OF DEFENDANTS' UNLAWFUL AGREEMENT

44. Defendants had the opportunity to make and manage their unlawful agreement and monitor their compliance with the agreement through, among others, the steps and means alleged in the succeeding paragraphs.

45. During and prior to the Class Period, defendants continuously communicated and worked together as co-underwriters and members of underwriting syndicates, as market makers, and in the other capacities alleged below.

46. Also, defendants collaborated with one another in trade organizations such as the Securities Industry Association ("SIA"), including as members of SIA's Syndicate Committee. The SIA advanced defendants' individual and collective interests in increasing their revenues, reducing their costs, and inflating what the public pays to financial intermediaries.

47. Further, defendants frequently communicated with one another as members of the National Association of Securities Dealers, Inc. ("NASD") where they jointly participated in the trading of securities on the NASD's automated quotation system, commonly known as NASDAQ, and are and were members of various national and regional exchanges, including the New York Stock Exchange ("NYSE") and the American Stock Exchange ("AMEX"). Various defendants also combined to create various joint ventures in the securities market, including Stock Edge LLC, a stock trading vehicle for virtually all defendants, and Bond Book LLC, a bond trading system for virtually all defendants.

48. In addition to the foregoing, defendants had numerous other regular meetings, including meetings among

their top investment bankers, legal officers and marketing managers prior to and during the Class Period.

49. Defendants implemented their unlawful combination, conspiracy and agreement through and in connection with their agreements to combine together into underwriting syndicates for Class Securities.

50. Defendants conducted their underwritings together in varying combinations and worked with other defendants at multiple times during the Class Period. For example, in underwritings of Class Securities in which Goldman was the lead underwriter, CSFB was a co-underwriter more than 35 times, Morgan Stanley was a co-underwriter more than 23 times, and Robertson Stephens was a co-underwriter more than 25 times. Similarly, in underwritings of Class Securities in which CSFB was lead underwriter, Robertson Stephens was a co-underwriter more than 38 times.

51. Defendants had, through the foregoing means and others, frequent communications among themselves and with other defendants about IPOs, Class Securities, their division of revenues, the aftermarket prices of Class Securities, the anticompetitive charges and tie-purchases alleged herein and related matters.

52. During the foregoing communications and underwritings, defendants were all aware that the amount of the anticompetitive charges and future underwriting business opportunities depended upon whether, and the extent to which, the price of the newly offered common stock increased during aftermarket trading. The more that prices increased in aftermarket trading, the more that defendants' customers were attracted to IPOs and the more revenues that defendants, individually and collectively, could make from IPOs.

53. In order to implement their anticompetitive and unlawful agreement alleged herein, various defendants jointly took the steps, had the further communications, and

made the further agreements alleged in the succeeding paragraphs.

54. Defendants, jointly and individually, hosted "road shows" during which customers were introduced to the issuer and its managers and during which the offering was described. Defendants also conducted telephone calls, meetings and other regular communications prior to the IPOs of Class Securities. During, or as part of these communications, including communications separate and apart from the "road shows," defendants, at times jointly, made inquiries of customers or others interested in purchasing Class Securities concerning the number of shares that such person would be willing to purchase in the aftermarket and the prices such person would be willing to pay for such shares.

55. Representatives of different defendants discussed and communicated with each other about the requirement of tie-in purchases, the amount of increase in Class Securities prices after IPOs and related matters.

56. As part of defendants' agreement, various defendants disclosed to each other on a reciprocal basis the identities of the customers to whom they allocated, or intended to allocate, Class Securities. In order to monitor whether the customers complied with the preconditions to receiving allocations, these communications among defendants included discussions of customers' trades, as well as cooperation in supplying various data to one another and third parties.

57. In furtherance of their conspiracy, defendants jointly informed customers of the terms of the tie-in purchases that they required for participation in the IPOs.

58. Various defendants jointly used as a criterion in determining the levels of participation by non-defendant underwriters in a given syndicate whether and, if so, the extent to which, those underwriters adhered to the anticompetitive requirements described herein. With respect to defendants and non-defendant co-conspirators, the agreement was to re-

ward those underwriters from deal to deal for their adherence to the agreement on a reciprocal basis regardless of the identity of the lead underwriter.

59. Various officers, partners and employees of defendants moved to similar positions with other defendants. In their new positions, such persons continued to engage in the same unlawful conduct described herein on behalf of their new employers and the conspiracy and combination alleged herein.

60. In connection with the offering of the Class Securities, defendants pre-committed their research analysts to issue positive reports shortly following the offering (known among defendants as "booster shots") and systematically to take other steps to help sell and promote the Class Securities in the IPO and the aftermarket. At times, defendants would take other actions designed to maintain a level of credibility.

61. Throughout the Class Period, defendants and their co-conspirators all undertook other overt acts which furthered the conspiracy's objectives by inflating the prices of Class Securities in the aftermarket.

62. Defendants were required to and did have compliance procedures, practices and reports which promptly informed defendants of the amount of commissions, charges, and other payments that their customers were making and the customers' commissions-to-equity ratios and turnover ratios, and whether the customers were paying any anticompetitive charges. Defendants were all aware of the effects of their unlawful agreement upon their customers, and each defendant monitored their customers' trades and accounts from one IPO to the next to ensure that customers were paying the corresponding anticompetitive charges. Defendants provided information to and received information from paid subscription services, among others, relating to commissions paid to defendants by various customers.

63. As a result of the foregoing, and other communications, all defendants were aware that each of them was complying with their unlawful agreement. Indeed, CSFB, for example, has repeatedly and conspicuously stated that its practices in connection with IPOs during the relevant time period were consistent with the practices employed by the other underwriters.

64. In the foregoing circumstances, it was in the individual and collective revenue maximizing interests of all defendants to agree on and impose the additional anticompetitive charges and the requirement of tie-in or laddered purchases.

IX. VIOLATIONS ALLEGED

65. During the Class Period, defendants combined, conspired and agreed to require from customers the anticompetitive charges and to inflate the aftermarket prices for Class Securities.

66. Defendants shared a common motive to require their anticompetitive charges and inflate aftermarket prices of Class Securities; only by acting together and through joint action and agreement among themselves and their co-conspirators were Defendants able to require and obtain the anticompetitive charges and inflate the prices of the Class Securities after the IPOs. Such charges and inflated prices greatly increased defendants' individual and collective revenues.

67. The Defendants' combination, conspiracy and agreement was not disclosed to, approved by, or regulated by the NASD or the SEC.

68. Application of antitrust laws to the unlawful combination, conspiracy and agreement alleged herein would not subject defendants to standards of conduct that would conflict with anything in the federal securities laws or the rules or regulations of the SEC or NASD.

69. This Complaint does not challenge any statute, rule, regulation or interpretation by the SEC or any self regulatory organization, including any statute, rule, regulation or interpretation relating to price stabilization efforts (i.e., efforts in the aftermarket to retard the decline of the prices at levels below the IPO price).

X. EFFECT OF THE CONSPIRACY

70. The aforesaid combination, conspiracy and agreement had the effect, among other things, of imposing on plaintiffs and Class members an additional anticompetitive charge in order to purchase Class Securities in the initial offering.

71. The aforesaid combination, conspiracy and agreement had the additional effect, among other things, of artificially inflating the aftermarket prices and the consideration paid by plaintiffs and Class members for the Class Securities to levels above that which would have existed in a competitive market. With regard to IPOs during the Class Period of technology-related companies in the amount of $20,000,000 or more, those IPOs in which a defendant served as the lead underwriter had a first day percentage increase in price that, on average, was approximately twice as high as that of IPOs for which no defendant was the lead underwriter.

72. The aforesaid combination, conspiracy and agreement had the effect of increasing defendants' revenues.

73. The aforesaid combination, conspiracy and agreement also had the effect of injecting substantial, accumulating demand for Class Securities into the market. This injected demand and the increasing prices of the Class Securities, in turn, attracted additional customer interest in, and demand for, the Class Securities. The totality of defendants' conduct, as described herein, was specifically intended to and did have the cumulative and reinforcing effect of inflating aftermarket prices of Class Securities, drawing in more participants and

inducing them to buy or pay higher prices for Class Securities.

74. As a result of their unlawful agreement and increases in the prices of Class Securities following the offerings, defendants were able to attract dramatically more IPO business. Defendants' agreement caused more shares to be traded and attracted more trading interest for defendants' market making operations on the first trading day and thereafter. Until 1998, the average volume of trades on the first day of trading was roughly one-third the number of shares publicly offered. Average volume dramatically increased during 1998-2000. Accordingly, defendants were able to charge and make, in the aggregate, billions of dollars in additional revenues from (a) the collection of additional underwriting charges, commissions and fees, as well as the anticompetitive charges obtained in initial public offerings, (b) increased customer trading business resulting from inflated trading volumes, and (c) other sources.

XI. RELEVANT MARKET

75. Each defendant possessed a series of attributes that, collectively, permitted it to be a leading underwriter of equity IPOs. These attributes included financial and reputational capital; substantial sales and customer base; established trustworthiness and relationships; and sufficient due diligence, analytical, market making, and other specialized staff, experience and expertise. Firms that did not possess this series of attributes were not effective competitors, were not effective production substitutes and could not overcome the barriers to entry to be a leading underwriter of equity IPOs.

76. Enhancing each defendant's foregoing series of attributes, each defendant also possessed, or developed during the Class Period, a second series of attributes that, collectively and in combination with its first series of attributes alleged above, permitted it to be a leading underwriter of IPOs

of technology-related companies in the relevant market.[3] These attributes included specialized analytical and due diligence expertise in technology-related companies; sufficient staff conversant with technology companies; experience with technology-related companies; other attributes that enabled each defendant to create or adeptly employ the vocabulary, systems and valuation (or supposed valuation) methodologies that could rank, compare, and lend legitimacy to the technology-related companies; and the commitment of reputational and financial capital to build and create a market for initially selling to the public and then trading in the IPO stocks of the technology-related companies. Firms that did not possess this combination of attributes were not effective competitors, were not effective production substitutes and could not overcome the barriers to entry to be underwriters of IPOs of technology-related companies.

77. As is recognized by investors and market participants, (a) tech-related companies are a distinct market, and (b) there is a line of demarcation in underwriting between issues of IPO securities that raise less than $20,000,000 and those that raise $20,000,000 or more. Defendants did not find it cost-effective to serve and generally did not serve as lead underwriters for technology-related or other companies that issued IPO securities raising less than $20,000,000. The market for initially selling to the public and subsequently trading in IPO securities of technology-related companies which raised less than $20,000,000 is a distinct market.

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[3] A "technology-related" company includes all Class Securities and the securities of any other company that qualified for or was assigned by Thomson Financial Securities Data the following U.S. Department of Commerce Standard Industrial Classification Codes: 3571, 3572, 3575, 3577, 3578, 3661, 3663, 3669, 3674, 3812, 3823, 3825, 3826, 3827, 3829, 3841, 3845, 4812, 4813, 4899, 7370, 7371, 7372, 7373, 7374, 7375, 7378 or 7379; or was classified by Thomson Financial Securities Data as "High Tech."

78. The relevant market is the market for initially selling to the public and thereafter trading securities of issuers in technology-related companies in initial public offerings of stock listed on U.S. exchanges or over-the-counter markets in a total dollar issue of $20 million or more. In the alternative, the relevant market is the market for initially selling to the public and thereafter trading securities for all equity issuers in initial public offerings of stock listed on U.S. exchanges or over-the-counter markets raising $20 million or more.

XII. INJURY TO PLAINTIFFS AND CLASS MEMBERS

79. Plaintiffs and Class members were injured in their business or property by defendants' violations of the antitrust laws in that plaintiffs and Class members paid the anticompetitive charges and/or the inflated aftermarket prices caused by defendants' unlawful combination, conspiracy and agreement.

FIRST CLAIM FOR RELIEF FOR VIOLATION OF SECTION 1 OF THE SHERMAN ACT AGAINST DEFENDANTS

80. Plaintiffs incorporate by reference the allegations of paragraphs 1 through 79, as if fully set forth herein.

81. Defendants entered into a combination, conspiracy and agreement in unreasonable restraint of trade in violation of Section 1 of the Sherman Act.

82. The purpose and effect of defendants' unlawful combination, conspiracy and agreement was to require plaintiffs and other members of the Class to pay anticompetitive charges to defendants and inflated prices for Class Securities in the aftermarket.

83. By reason of the foregoing, plaintiffs and the other members of the Class have been damaged in their business and property.

SECOND CLAIM FOR RELIEF FOR VIOLATION OF NEW YORK GENERAL BUSINESS LAW § 340 AGAINST DEFENDANTS

84. Plaintiffs incorporate by reference the allegations of paragraphs 1 through 79 above as if fully set forth herein.

85. Defendants' unlawful conduct constitutes a violation of N.Y. General Business Law § 340. Through such conduct, which defendants engaged in in New York, defendants restrained competition and the free exercise of activities in the conduct of business, trade and commerce and in the furnishing of services in New York.

86. Defendants' restraints of business, trade and commerce have substantially affected business, trade and commerce in he State of New York.

87. By reason of the foregoing, plaintiffs and the other members of the Class have been damaged.

THIRD CLAIM FOR RELIEF FOR VIOLATION OF ANTITRUST LAWS OF OTHER STATES

88. Plaintiffs incorporate by reference the allegations of paragraphs 1 through 79 above as if fully set forth herein.

89. By reason of the foregoing, defendants have entered into agreements in restraint of trade in violation of Arizona Revised Stat. §§ 44-1401, *et seq.* with respect to purchases of Class Securities in Arizona.

90. By reason of the foregoing, defendants have entered into agreements in restraint of trade in violation of Cal. Bus. & Prof. Code § 17200, *et seq.* with respect to purchases of Class Securities in California.

91. By reason of the foregoing, Defendants have entered into agreements in restraint of trade in violation of D.C. Code Ann. §§ 28-4503, *et seq.* with respect to purchases of Class Securities in the District of Columbia.

92. By reason of the foregoing, Defendants have entered into agreements in restraint of trade in violation of Fla. Stat. §§ 501.201, *et seq.* with respect to purchases of Class Securities in Florida.

93. By reason of the foregoing Defendants have entered into agreements in restraint of trade in violation of Kan. Stat. Ann. §§ 50-101, *et seq.* with respect to purchases of Class Securities in Kansas.

94. By reason of the foregoing, Defendants have entered into agreements in restraint of trade in violation of La. Rev. Stat. §§ 51:137, *et seq.* with respect to purchases of Class Securities in Louisiana.

95. By reason of the foregoing, Defendants have entered into agreements in restraint of trade in violation of Me. Rev. Stat. Ann. 10, § 1101, *et seq.* with respect to purchases of Class Securities in Maine.

96. By reason of the foregoing, defendants have entered into agreements in restraint of trade in violation of Mass. Ann. Laws ch. 93A, *et seq.* with respect to purchases of Class Securities in Massachusetts.

97. By reason of the foregoing, defendants have entered into agreements in restraint of trade in violation of Mich. Comp. Laws Ann. §§ 445.773, *et seq.* with respect to purchases of Class Securities in Michigan.

98. By reason of the foregoing, defendants have entered into agreements in restraint of trade in violation of Minn. Stat. §§ 325D.52, *et seq.* with respect to purchases of Class Securities in Minnesota.

99. By reason of the foregoing, defendants have entered into agreements in restraint of trade in violation of Miss. Code. Ann. §§ 75-21-1, *et seq.* with respect to purchases of Class Securities in Mississippi.

100. By reason of the foregoing, defendants have entered into agreements in restraint of trade in violation of Nev.

Rev. Stat. Ann § 598A, *et seq.* with respect to purchases of Class Securities in Nevada.

101. By reason of the foregoing, defendants have entered into agreements in restraint of trade in violation of New Jersey Antitrust Act, N.J. Stat. Ann §§56:9-1, *et seq.* with respect to purchases of Class Securities in New Jersey.

102. By reason of the foregoing, defendants have entered into agreements in restraint of trade in violation of N.M. Stat. Ann. §§ 57-1-1, *et seq.* with respect to purchases of Class Securities in New Mexico.

103. By reason of the foregoing, defendants have entered into agreements in restraint of trade in violation of N.C. Gen. Stat. §§ 75-1, *et seq.* with respect to purchases of Class Securities in North Carolina.

104. By reason of the foregoing, defendants have entered into agreements in restraint of trade in violation of N.D. Cent. Code § 51-08.1-01, *et seq.* with respect to purchases of Class Securities in North Dakota.

105. By reason of the foregoing, defendants have entered into agreements in restraint of trade in violation of S.D. Codified Laws Ann. § 37-1, *et seq.* with respect to purchases of Class Securities in South Dakota.

106. By reason of the foregoing, defendants have entered into agreements in restraint of trade in violation of Tenn. Code Ann. §§ 47-25-101, *et seq.* with respect to purchases of Class Securities in Tennessee.

107. By reason of the foregoing, defendants have entered into agreements in restraint of trade in violation of Vt. Stat. Ann. 9, § 2453, *et seq.* with respect to purchases of Class Securities in Vermont.

108. By reason of the foregoing, defendants have entered into agreements in restraint of trade in violation of W. Va. Code §§ 47-18-1, *et seq.* with respect to purchases of Class Securities in West Virginia.

109. By reason of the foregoing, defendants have entered into agreements in restraint of trade in violation of Wis. Stat. § 133.01, *et seq.* with respect to purchases of Class Securities in Wisconsin.

110. Plaintiffs and members of the Class have been damaged by reason of the foregoing.

PRAYER FOR RELIEF

WHEREFORE, plaintiffs pray:

a. That this action be maintained as a class action under Rule 23(b)(2) and (3) of the Federal Rules of Civil Procedure;

b. That the unlawful combination, conspiracy and agreement alleged herein be adjudged, decreed and declared to be in unreasonable restraint of trade or commerce in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1, and a violation of the antitrust laws of the states identified herein;

c. That plaintiffs and the Class recover damages, as provided by law, and that judgment be entered in favor of plaintiffs and the Class and against defendants in an amount to be trebled as provided by law;

d. That plaintiffs and the Class recover their costs of this suit, including reasonable attorneys' fees and expenses as provided by law; and

e. That plaintiffs and the Class be granted such other or further relief as may appear just and proper to this Court.

Dated: New York, New York
January 2, 2002

LOVELL & STEWART, LLP

By /s/ Christopher Lovell

MILBERG WEISS BERSHAD HYNES & LERACH LLP

By /s/ Melvyn I. Weiss

Christopher Lovell
(CL 25945)
500 Fifth Avenue
New York, New York 10110
(212) 608-1900
Coordinating Chairman of
Plaintiff's Executive Committee

By /s/ Saul Roffe/by CL
Howard Sirota (HS 5925)
Saul Roffe (SR 2108)
110 Wall Street
New York, New York 10005
(212) 425-9055

Melvyn I. Weiss (MW 1392)
Robert A. Wallner (RW 5109)
J. Douglas Richards (JDR 6038)
Ariana J. Tadler (AT 0452)
One Pennsylvania Plaza
New York, New York 10119
(212) 594-5300

By /s/ Richard S. Schiffrin /by CL
Richard S. Schiffrin
David Kessler
Krishna B. Narine
Three Bala Plaza East,
Suite 400
Bala Cynwyd, PA 19004
(610) 667-7706

WOLF HALDENSTEIN ADLER
FREEMAN & HERZ LLP

By /s/ Fred T . Isquith/THB
Fred T. Isquith (FI 6782)
Mary Jane Edelstein Fait
Thomas H. Burt (TB 7601)
270 Madison Avenue
New York, New York 10016
(212) 545-4600

Plaintiffs' Executive Committee

Waite, Schneider, Bayless and
Chesley Co., L.P.A.
Stanley Chesley
1513 Fourth & Vine Tower
One West Fourth Street
Cincinnati, Ohio 45202
(513) 621-0267

Beatie and Osborn, LLP
Russell H. Beatie
521 Fifth Avenue
New York, New York 10175
(212) 888-9000

Jonathan Kord Lagemann
300 East 42nd Street, 10th Floor
New York, New York 10017
(212) 599-0990

Louis F. Burke, P.C.
Louis F. Burke
360 Lexington Avenue, 14th Floor
New York, New York 10017
(212) 682-1700

Schatz & Nobel, P.C.
Andrew M. Schatz
330 Main Street
Hartford, Connecticut 06106
(860) 493-6292

Wechsler Harwood Halebian
& Feffer, LLP
Stuart Wechsler
488 Madison Avenue, 8th Floor
New York, New York 10022
(212) 935-7400

Cauley Geller Bowman & Coates, LLP
Steve Cauley
11311 Arcade Drive, Suite 200
Little Rock, Arkansas 72212
(501) 312-8500

Major & White
Ann D. White
261 Old York Road
Suite 810
Jenkintown, Pennsylvania 19046
(215) 481-0273

Feldman & Rifkin, LLP
Mark C. Rifkin
101 Greenwood Avenue, Suite 230
Jenkintown, Pennsylvania 19046
(215) 885-3302

Law Office of Charles Piven
Charles Piven
Two World Trade Center – Baltimore
401 East Pratt Street, Suite 2525
Baltimore, Maryland 21202

Law Office of Marc Henzel
Marc Henzel
273 Montgomery Avenue, Suite 202
Bala Cynwyd, Pennsylvania 19004
(610) 660-8000

Other Plaintiffs' Counsel

[Exhibit A and Certificate of Service omitted in printing]

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

MILTON PFEIFFER, on behalf of himself and all others similarly situated, Plaintiff, -against- CREDIT SUISSE FIRST BOSTON CORP., THE GOLDMAN, SACHS GROUP, INC., LEHMAN BROTHERS, INC., MERRILL LYNCH, PIERCE, FENNER & SMITH, INC., MORGAN STANLEY DEAN WITTER & CO., BANCBOSTON ROBERTSON, STEPHENS, INC., SALOMON SMITH BARNEY, INC., FIDELITY DISTRIBUTORS CORPORATION, FIDELITY BROKERAGE SERVICES LLC, FIDELITY INVESTMENTS INSTITUTIONAL SERVICES CO., JANUS CAPITAL CORPORATION, COMERICA, INC. d/b/a MUNDER CAPITAL MANAGEMENT, VAN WAGONER CAPITAL MANAGEMENT, INC. and VAN WAGONER FUNDS, INC., Defendants.	:	Civil Action No. [01 CV 11420] **CLASS ACTION COMPLAINT** Jury Trial Demanded [Filed Dec. 12, 2001]

Plaintiff, Milton Pfeiffer, by his attorneys, Beatie and Osborn LLP, for his Complaint against defendants, alleges as follows.

NATURE OF THE ACTION

1. This is an antitrust class action on behalf of plaintiff and all similarly situated individuals who purchased or acquired the identified securities between January 1, 1998 and the date of the filing of this Complaint (the "Class Period").

2. In 1998 or later, defendants Credit Suisse First Boston Corp., the Goldman, Sachs Group, Inc., Lehman Brothers, Inc., Merrill Lynch, Pierce, Fenner & Smith, Inc., Morgan Stanley Dean Witter & Co., Bancboston Robertson, Stephens, Inc., and Salomon Smith Barney, Inc. (collectively, the "Underwriter Defendants") paid bribes to and/or accepted bribes from defendants Fidelity Distributors Corporation, Fidelity Brokerage Services LLC, Fidelity Investments Institutional Services Co., Empire Fidelity Investments Life Insurance Co., Janus Capital Corporation, Comerica, Inc., Van Wagoner Capital Management, Inc. and Van Wagoner Funds, Inc. (collectively, the "Institutional Defendants"), exchanging favored allocations of securities in initial public offerings for obedience to particular terms and conditions governing the resale of these securities.

3. This bribery arrangement was part of a course of conduct developed by the Underwriter Defendants to inflate the price of particular securities.

4. Among the companies whose initial public offerings were part of the bribery arrangement to inflate prices were Aether Systems, Inc., Akamai Technologies, Inc., Ariba, Inc., Autoweb, Inc., Avici Systems, Inc., Calico Commerce, Inc., Clarent Corp., Covad Communications Group, Inc., Corvis Corp., Digimarc Corp., E-LOAN, Inc., eToys.com, Inc., Expedia, Inc., Freemarkets, Inc., Gadzooks Networks, Inc., Global Crossing, Ltd., Internet Capital Group, Inc., Intertrust Technologies Corp., IVillage, Inc., Kana Software, Inc., Keynote Systems, Inc., Marketwatch.com, Inc., MP3.com, Inc., Multex.com, Inc.,

Netzero.com, Inc., Palm, Inc., PlanetRX.com, Inc, Priceline.com, Inc., Razorfish, Inc., Red Hat, Inc., Rhythms NetConnections, Inc., Silverstream Software, Inc., Stamps.Com, Inc., Sycamore Networks, Inc., Tibco Software, Inc., VA Linux Systems, Inc., Wireless Facilities, Inc., and numerous additional securities (collectively, the "IPO securities").

5. As a result, when Plaintiff and the other class members purchased shares of the IPO securities, the prices of these securities were substantially inflated.

6. This conduct constituted commercial bribery and other conduct in violation of Section 2(c) of the Robinson Patman Act, 15 U.S.C. Section 13(c).

THE PARTIES

7. Plaintiff Milton Pfeiffer is an individual residing in Staten Island, New York, and was at all times during the relevant period a retail customer of defendants Merrill Lynch, Pierce, Fenner & Smith, Inc., and Morgan Stanley Dean Witter & Co.

8. On various dates in the relevant period, Plaintiff Pfeiffer bought shares of common stock of Aether Systems, Inc., Akamai Technologies, Inc., Ariba, Inc., Palm, Inc., and Sycamore Networks, Inc.

9. Defendant Credit Suisse First Boston Corp. ("CSFB") is a Massachusetts corporation, with its principal place of business at 11 Madison Avenue, New York, New York 10010.

10. During the relevant period. CSFB served as a member of the selling group and/or a co-lead underwriter for one or more of the IPO securities.

11. Defendant The Goldman, Sachs Group, Inc. ("Goldman Sachs") is a Delaware corporation, with its principal place of business at 85 Broad Street, New York, New York 10004.

12. During the relevant period, Goldman Sachs served as a member of the selling group and/or a co-lead underwriter for one or more of the IPO securities.

13. Defendant Lehman Brothers, Inc. ("Lehman") is a corporation organized under the laws of the State of Delaware, with its principal place of business in New York, New York.

14. During the relevant time period, Lehman served as a member of the selling group for one or more of the class securities.

15. Defendant Merrill Lynch, Pierce, Fenner & Smith, Inc. ("Merrill Lynch") is a Delaware corporation, maintaining offices for the transaction of business in Smithtown, New York, as well as elsewhere within this District.

16. During the relevant period Merrill Lynch served as a member of the selling group and/or a co-lead underwriter for one or more of the IPO securities.

17. Defendant Morgan Stanley Dean Witter & Co. ("Morgan Stanley") is a Delaware corporation, maintaining offices for the transaction of business in Hauppauge, New York, as well as elsewhere within this District.

18. During the relevant period Morgan Stanley served as a member of the selling group and/or a co-lead underwriter for one or more of the IPO securities.

19. Defendant BancBoston Robertson, Stephens, Inc. ("BancBoston") is a California corporation, with its principal place of business at 555 California Street, San Francisco, CA 94104.

20. During the relevant period BancBoston served as a member of the selling group and/or a co-lead underwriter for one or more of the IPO securities.

21. Defendant Salomon Smith Barney, Inc. ("Smith Barney") is a Delaware corporation, maintaining offices for the transaction of business in Hauppauge, New York.

22. Defendant Smith Barney acquired Lehman Brothers, Inc.

23. During the relevant time period, Smith Barney, through its activities or as successor to Lehman Brothers, Inc., served as a member of the selling group and/or a co-lead underwriter for one or more of the IPO securities.

24. Defendant Fidelity Distributors Corporation ("Fidelity Distributors") is a Delaware corporation with its principal place of business at 82 Devonshire St., Boston, Massachusetts.

25. Defendant Fidelity Brokerage Services LLC ("Fidelity Brokerage") is a Delaware limited liability company with its principal place of business at 100 Summer Street, Boston, Massachusetts.

26. Defendant Fidelity Investments Institutional Services Company, Inc. ("Fidelity Institutional") is a Delaware corporation with its principal place of business at 82 Devonshire Street, Boston, Massachusetts.

27. During the relevant period, Fidelity Distributors, Fidelity Brokerage, and Fidelity Institutional were favored customers and purchasers and sellers of securities through the Underwriter Defendants and were institutional purchasers of each of the IPO securities.

28. Defendant Janus Capital Corporation ("Janus") is a Colorado corporation with its principal place of business at 100 Fillmore Street, Denver, Colorado.

29. During the relevant time period, Janus was a favored customer and purchaser and seller of securities through the Underwriter Defendants and an institutional purchaser of each of the IPO securities.

30. Defendant Comerica, Inc. is a corporation based in Detroit, Michigan, and owns approximately 94.7% of a partnership known as Munder Capital Management ("Munder"). Munder's principal place of business is at 480 Pierce Street, Birmingham, Michigan.

31. During the relevant period, Munder was a favored customer and purchaser and seller of securities through the Underwriter Defendants and was an institutional purchaser of each of the IPO securities.

32. Defendant Van Wagoner Capital Management, Inc. ("Van Wagoner Capital") is a Delaware corporation with its principal place of business at 345 California Street, Suite 2450, San Francisco, California.

33. Defendant Van Wagoner Funds, Inc. ("Van Wagoner Funds") is a Maryland corporation with its principal place of business at 345 California Street, Suite 2450, San Francisco, California.

34. During the relevant period, Van Wagoner Capital and Van Wagoner Funds were favored customers and purchasers and sellers of securities through the Underwriter Defendants and were institutional purchasers of each of the IPO securities.

35. Although plaintiff has determined that each of the institutional mutual fund administrators named in this Complaint was involved in the commercial bribery arrangement, plaintiff does not know which subsidiaries, etc., of any institutional defendant performed wrongful acts.

36. Plaintiff will ascertain this information through discovery as early as possible and make any necessary adjustments in the pleadings.

JURISDICTION AND VENUE

37. This Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 1331 and 1337(a) and 15 U.S.C. §§ 15 and 26.

38. Venue is proper in this District pursuant to 15 U.S.C. § 22 because each defendant resides, or is licensed to do business, or is doing business, or transacts business in this District.

39. To carry out their arrangement defendants used the means and instrumentalities of interstate commerce, had a substantial effect on interstate trade and commerce, and unreasonably restrained interstate commerce.

CLASS ALLEGATIONS

40. Pursuant to Rule 23 of the Federal Rules of Civil Procedure, plaintiff brings this action on his own behalf and as a class action, on behalf of all persons and entities who purchased class securities during the Class Period and were harmed by defendants' actions described below.

41. The Underwriter Defendants, the Institutional Defendants, and any person, firm, trust, corporation, or other entity related to or affiliated with any defendant are excluded from the class.

42. This action is properly maintainable as a class action. Because thousands of individuals purchased the class securities throughout the United States, the class is so numerous that joinder of all members is impracticable.

43. Questions of law and fact common to the class predominate over questions affecting individual class members, including:

(a) did the Underwriter Defendants receive bribes from or pay bribes to the Institutional Defendants in order to ensure the escalation and maintenance of the

prices of IPO securities after the initial public offerings;

(b) did the Institutional Defendants agree to pay and in fact pay to the Underwriter Defendants a percentage of their profits from the sale of the IPO securities at inflated prices;

(c) did the Underwriter Defendants, acting as fiduciaries for plaintiff and the other class members, inflate the prices of the IPO securities, purchase the IPO securities in the aftermarket, encourage plaintiff and the other class members to purchase the IPO securities at inflated prices resulting from misconduct by defendants in the aftermarket and the market, and maximize the Institutional and Underwriter Defendants' profits on resales of IPO securities at inflated prices; and

(d) did plaintiff and other class members suffer damages as a result of defendants' conduct (if so, how much)?

44. Plaintiff is committed to prosecuting this action and has retained competent counsel experienced in litigation of this nature.

45. The claims of plaintiff are typical of the claims of the other members of the class and plaintiff has the same interests as the other members of the class.

46. Plaintiff anticipates that the management of this litigation as a class action will present no difficulty.

COUNT ONE

VIOLATION OF SECTION 2(c) OF THE ROBINSON-PATMAN ACT

47. Plaintiff repeats and realleges the allegations contained in paragraphs one to forty-six of the Complaint with the same force and effect as if they were set forth here in full.

FACTUAL ALLEGATIONS

Background

48. Corporations that distribute their equity securities to the public usually sell them in a public offering through investment bankers.

49. In a typical public offering, the investment banker simultaneously purchases the securities from the offering company and/or shareholders and sells them to the public.

50. For their investment banking clients, investment bankers make, among other things, public offerings of their clients' securities to the investing public.

51. An investment banking client whose securities are not owned and traded by the public and who has never had a public offering of its securities is known as a "green" company, and the first sale of its securities to the investing public is known as an "initial public offering" ("IPO").

52. From time to time an investment banking client or a group of investment banking clients in an identifiable business will have large demand for their securities in an IPO.

53. In some IPOs the demand by the investing public for the securities of the issuer-client is great and the securities available in the public offering are oversubscribed.

54. Oversubscription occurs when "indications of interest" to purchase the securities by investors exceed the number of securities available to fill purchase orders. This kind of public offering is known as a "hot issue."

55. In the relevant period the securities subject to the greatest demand were high technology securities, particularly internet securities.

56. In the typical IPO for a "hot issue" company, the investment banker agrees with the issuer-client to purchase all the securities for the public offering from the issuer-client.

This kind of transaction is known as a "firm commitment" underwriting.

57. The period of marketing for the securities of investment banking clients-issuers after the IPO is known as the "aftermarket" or the secondary market. It has no statutory, customary, or other fixed length.

58. One of the most important market reactions for the investment banking defendants in the aftermarket is the rise of the market price of the security above the IPO price and the maintenance of higher market prices for an extended period.

59. Important to the occurrence of the rise in the price of the stock after the IPO and to the maintenance of the higher prices is continued investor desire to purchase the securities of the issuer-client.

60. The continued investor interest is marked by and proven by an excess of purchase orders over sell orders.

61. To assure that this effect occurred, the Underwriter Defendants sold large blocks of their IPO securities, as much as fifty per cent of any IPO, to selected customers with restrictive conditions.

62. The securities sold to an investor in an IPO are known in the securities trade as an "allocation."

63. Securities from a "hot issue IPO" are allocated by the investment banking firms to the various customers on a discretionary but highly selective basis.

64. A customer who sells his allocation of securities within twenty-four to forty-eight hours after purchasing them on the effective date of the offering is known in the securities industry as a "flipper."

65. To the investment banker, a "flipper" is an undesirable person and is not considered a satisfactory candidate for an allocation in a "hot issue IPO" of securities.

66. Persons who hold for at least one week and persons who hold for at least one month are also categorized by investment bankers and are considered more desirable for the allocation of securities from a "hot issue IPO."

67. Allocation of securities from a "hot issue IPO" to customers who hold tends to assure an excess of purchasers over sellers and to drive the market price of the securities upward.

68. Persons who hold securities from this type of offering for periods long beyond one month are the most desirable purchasers of securities from a "hot issue IPO" because their conduct tends to induce the rise in the market price for the securities above the initial offering price and the maintenance of higher market prices for an extended period of time.

69. During the relevant period, the Underwriter Defendants kept careful records showing the trading activity of all their broker-dealer clients and categorized these clients according to the length of time they would hold securities allocated to them in a "hot issue IPO."

70. After this information was accumulated and the broker-dealer customers categorized, securities in "hot issue IPOs" were sold only to those customers who satisfied the retention criteria for their allocations.

71. In order to assure themselves of a continued supply of investment banking clients, i.e., clients-issuers, and a continuous supply of IPO business, the Underwriter Defendants agreed that they would rigorously apply uniform rules for the allocation of securities in "hot issue IPOs."

Fiduciary Relationship

72. As a public purchaser of many of the IPO securities and a retail customer of two of the Underwriter Defendants, plaintiff reposed trust and confidence in the Underwriter Defendants during the relevant period as the result of the supe-

rior expertise these defendants were reputed to have in the areas of investment research and advice.

73. As retail securities brokers and underwriters, the Underwriter Defendants accepted this role, and assumed a fiduciary responsibility to plaintiff and the other public purchasers of these securities to act in these purchasers' interests when providing investment advice.

Commercial Bribery

74. These investment bankers, known as "underwriters," received bribes from and paid bribes to the Institutional Defendants.

75. In 1998 or earlier, the Institutional Defendants and the Underwriter Defendants participated in an arrangement as follows: the Underwriter Defendants agreed to give the Institutional Defendants favored (exceptionally large) allocations of the IPO securities in exchange for compliance with rules set and enforced by the Underwriter Defendants for the resale of these securities and the division of profits from resale.

76. Underwriters have a practice of allocating the IPO shares they sell differently to purchasers depending on the amount of time the purchasers hold the stock.

77. According to records kept by the underwriters and used by their syndicate divisions, the faster the purchasers resell, the less likely they are to receive an allocation of stock in any future IPO.

78. Accordingly, in order to ensure that they would receive large allocations of stock, the Institutional Defendants agreed to the terms and conditions established by the Underwriter Defendants.

79. The Institutional Defendants agreed to the terms and conditions imposed by the Underwriter Defendants because they knew that the terms and conditions would maximize the price of the IPO security and the Institutional Defendants' profits at sale.

80. Among the terms and conditions required by the Underwriter Defendants in the bribery arrangement were the following:

Timed Resale

81. The Institutional Defendants agreed that, in exchange for the large IPO allocation, they would hold these securities for an extended period of time.

82. The Institutional Defendants agreed that, in exchange for the large IPO allocation, they would not resell the securities until given permission to do so by the Underwriter Defendants' syndicate division.

Split Profits

83. Each Institutional Defendant agreed that, in exchange for the large IPO allocation, it would split their profits on the allocation with the Underwriter Defendant that made the allocation by giving one-third of its profits to that Underwriter Defendant.

Involuntary Purchases

84. Each Institutional Defendant also agreed that, in exchange for the large IPO allocation, it would purchase additional large quantities of the security in the aftermarket, or market for the stock following the IPO.

85. Each Institutional Defendant agreed that, in exchange for the large IPO allocation, it would not resell these additional purchases until they received instructions from the syndicate division.

86. These additional purchases had the effect of sustaining the market price of the stock or driving the price upward.

87. The Institutional Defendants knew they would be guaranteed a profit because the Underwriter Defendants would later instruct them when to sell the purchased stock in order to realize this profit.

88. These practices violated the fiduciary obligations the Underwriter Defendants had to plaintiff and other investors who bought and sold any of the IPO securities in the market and aftermarket that followed each IPO.

89. On information and belief, the Institutional Defendants were willing to conspire with the Underwriter Defendants because they could purchase the hot issue IPO security in one of their smaller funds where it would show to advantage and put the abnormally high commission in one of their largest funds where it would not show.

Inflation of the Stock Prices

90. As part of the bribery arrangement described here, the Underwriter Defendants engaged in numerous practices having a direct inflationary effect on the market prices of the IPO securities. These practices included the following:

Continuous "Buy" Recommendations

91. The Underwriter Defendants agreed among themselves and with the Institutional Defendants that their research departments would issue continuous "buy," "strong buy," and/or "outperform" recommendations for hot issue IPO securities.

92. These favorable recommendations were made without regard for the fundamentals of the issuer, its business and financial prospects, or the expected future price of its securities.

93. These recommendations were issued to broker-dealer clients of the Underwriter Defendants but also to retail customers of the Underwriter Defendants and to other members of the investing public.

94. These recommendations were made in order to sustain or increase the market price of a given hot issue security.

95. Many of the hot issue IPO companies had no existing business and were unsuccessful in developing any business after the offerings of their securities to the public.

96. As a consequence, these issuers had no fundamental financial conditions that justified the market prices for which they traded in the aftermarket.

97. As investment bankers for the companies whose securities were sold in the hot issue IPOs and traded in the aftermarket, the Underwriter Defendants knew that these companies did not have sufficient fundamentals or business prospects to justify the market prices for their securities.

98. Nevertheless, the Underwriter Defendants agreed with the Institutional Defendants that the Underwriter Defendants would direct their analysts to issue continuous "buy" and similar recommendations for designated "hot issue IPOs."

99. In some cases the "hot issue IPO" securities, particularly the high technology internet companies, were sold to the public for IPO prices between $10 and $20.

100. As a result of trading and other activities by the Underwriter Defendants and the Institutional Defendants in the aftermarket, these securities' prices often rose to greater than $100 per share.

101. As a consequence of this conduct, defendants inflated the prices of the IPO securities far above any value relating to the fundamentals of the issuer or any other legitimate indicator of value; and plaintiff and the other class members purchased shares of the IPO securities at significantly inflated prices.

No "Sell" Recommendation

102. After the involuntary purchases described above had sustained or driven upward the market price of the security for an extended period, the price would begin to decline.

103. The prices declined because, among other things, the companies issuing the "hot issue IPO" securities failed to develop financial or business conditions that justified the market price of the securities.

104. The price of the securities would drop below $100 per share and continue in a steady decline, often reaching prices less than $5 per share and in some cases less than $1 per share.

105. Pursuant to the agreements among the Underwriter Defendants, the analysts would repeat the buy recommendation even while the price of the security declined or would in rare cases change the recommendation to a "hold."

106. In even more rare cases but not until after the price had passed well below the initial offering price per share, the analysts for the Underwriter Defendants would change the firm recommendation for the hot issue IPO security to a "sell."

Kickbacks to the Underwriter Defendants
Permission to Sell

107. Pursuant to their agreement with the Underwriter Defendants, the Institutional Defendants held their original allocations and their subsequent involuntary purchases until they received instructions from the Underwriter Defendants that they could sell.

108. When the market price for the "hot issue IPO" security had reached a high level and been sustained at the high level as long as it could, the syndicate departments for the Underwriter Defendants notified the Institutional Defendants that they were free to sell.

109. When the Institutional Defendants sold, they realized substantial profits on both classes of securities, the initial allocations and the subsequent involuntary purchases.

110. In addition to the purchases in the initial allocations, the syndicate departments of the Underwriter Defen-

dants kept records of all other purchases and sales by the Institutional Defendants.

111. This information allowed the syndicate departments of the Underwriter Defendants to calculate the profits realized by the Institutional Defendants.

112. Each Underwriter Defendant determined the amount of each Institutional Defendant's profits and its own share of the Institutional Defendant's profits from participation in hot issue IPO securities transactions.

Split Profits by Abnormally High Commissions

113. After the sales by the Institutional Defendants, the syndicate divisions of the Underwriter Defendants calculated the profit realized by the Institutional Defendant and told it the share of the profit to be remitted to the Underwriter Defendants.

114. Under the commercial bribery arrangement, no Institutional Defendant remitted one-third of its profit by direct payment to any Underwriter Defendant.

115. Instead, each Institutional Defendant directed major purchases and sales of unrelated securities by its largest funds to the Underwriter Defendants, paid unusually large commissions under the negotiated commission structure, and continued to pay unusually large commissions on brokerage business until it had remitted the agreed proportion of its profits to the Underwriter Defendants pursuant to the allocation agreement.

Violation of the Robinson-Patman Act

116. In 1998 or later, the Underwriter Defendants received compensation from the Institutional Defendants in exchange for favored allocations of IPO securities.

117. This arrangement of providing favored allocations in exchange for compensation was designed to facilitate the

receipt of improper profits by both the Underwriter Defendants and the Institutional Defendants in the relevant IPOs.

118. As part of this arrangement, the Underwriter Defendants, acting as the fiduciaries of plaintiff and other public purchasers of securities, encouraged the purchase of the IPO securities and purchased these securities on these purchasers' behalf at prices bearing little relation to the fundamentals or value of the companies issuing the securities.

119. The Underwriter Defendants knew the financial condition of the issuers when the Underwriter Defendants encouraged, required, and engaged in the purchase of the IPO securities.

120. The Underwriter Defendants knew that the encouragement of purchases would maintain the inflated market prices of the IPO securities and would, as a result, yield the Underwriter Defendants and the Institutional Defendants a substantially greater profit than they would receive from the IPO without the purchases.

121. The Underwriter Defendants participated in the bribery arrangement, including encouraging purchases of the IPO securities by plaintiff and other public purchasers and providing favored allocations of IPO securities to the Institutional Defendants in exchange for compensation, in violation of their fiduciary responsibilities to their retail customers and other public purchasers who purchased the IPO securities, including plaintiff and all others similarly situated.

122. By participating in this exchange of compensation, in violation of their fiduciary relationship with plaintiff and other public purchasers, the Underwriter Defendants have committed commercial bribery in violation of Section 2(c) of the Robinson-Patman Act, 15 U.S.C. section 13(c).

123. By acting as co-conspirators in the commercial bribery arrangement, the Institutional Defendants have com-

mitted commercial bribery in violation of Section 2(c) of the Robinson-Patman Act, 15 U.S.C. section 13(c).

124. As a result of the commercial bribery arrangement, the price of the IPO securities was artificially inflated.

125. Plaintiff and the other class members purchased shares of the IPO securities at these artificially inflated prices.

126. As a result, plaintiff and the other class members have been damaged.

WHEREFORE, plaintiff prays for judgment as follows:

(a) declaring this action to be a proper class action;

(b) awarding plaintiff and the members of the Class damages, including treble damages, and pre-judgment and post-judgment interest and costs; including reasonable attorneys' fees, accountants' fees, experts' fees, and other costs and disbursements;

(c) preliminarily and permanently enjoining from continuing the unlawful exchange of compensation; and

(d) awarding any other relief this Court deems proper under the circumstances.

JURY DEMAND

Plaintiff respectfully demands a trial by jury.

Dated: New York, New York
December 12, 2001

BEATIE AND OSBORN LLP
By: /s/ Daniel Osborn
Daniel A. Osborn (DO 2809)
521 Fifth Avenue
New York, New York 10175
(212) 888-9000

Attorneys for Plaintiff

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UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

SECURITIES AND EXCHANGE COMMISSION, Northeast Regional Office 233 Broadway New York, New York 10279, Plaintiff, -against- CREDIT SUISSE FIRST BOSTON CORPORATION, Defendant.	:	No. CV ([1:02CV00090]) [Filed January 22, 2002]

COMPLAINT

Plaintiff Securities and Exchange Commission (the "Commission") alleges the following against Credit Suisse First Boston Corporation ("CSFB"):

SUMMARY

CSFB SHARED PROFITS FROM HOT INITIAL PUBLIC OFFERINGS ("IPOS")

1. In exchange for shares in "hot" IPOs, CSFB wrongfully extracted from certain customers a large portion of the profits those customers made by flipping their IPO stock. From at least April 1999 through June 2000, CSFB employees allocated shares of IPOs to over 100 customers who were willing to funnel between 33 and 65 percent of their profits to CSFB. The profits were channeled to CSFB in the form of excessive brokerage commissions generated by the customers in unrelated securities trades that the customers generally effected solely to satisfy CSFB's demands for a share of the IPO profits.

2. The more than 100 customers involved in the conduct alleged in this Complaint were primarily small "hedge funds," private equity funds, and wealthy individuals (the "Customers"). The profit-sharing activity was pervasive in such Customer accounts serviced by CSFB's Institutional Sales Trading Desk, Private Client Services (PCS) Group and Technology PCS Group ("Tech PCS"). The Customers were a small segment of the more than 2400 accounts to which CSFB allocated IPO stock as lead managing underwriter during the relevant time; in no IPO were such Customers allocated more than 10 percent of the IPO stock. Nonetheless, IPO trading was so profitable during this period that the Customers funneled tens of millions of dollars in profits to CSFB through improper commission payments.

NATURE OF THE PROCEEDINGS AND THE RELIEF SOUGHT

3. The Commission brings this action pursuant to authority conferred upon it by Sections 21(d) and 21(f) of the Securities Exchange Act of 1934 ("Exchange Act"), 15 U.S.C. §§ 78u(e) and 78u(f), to enjoin CSFB from violating provisions of the federal securities laws and the Conduct

Rules of the National Association of Securities Dealers, Inc. ("NASD"). In addition, the Commission seeks other relief, including, but not limited to, disgorgement and civil penalties, and certain ancillary and further relief as is necessary and appropriate.

JURISDICTION AND VENUE

4. This Court has jurisdiction over this action pursuant to Sections 21(e) and 27 of the Exchange Act, 15 U.S.C. §§ 78u(e) and 78aa.

5. Venue lies in this Court pursuant to Section 27 of the Exchange Act, 15 U.S.C. § 78aa.

STATUTES AND RULES ALLEGED TO HAVE BEEN VIOLATED

6. CSFB has engaged in, and unless enjoined, will continue to engage, directly or indirectly, in transactions, acts, practices, and courses of business that constitute violations of Rules 2110 and 2330 of the NASD Rules of Conduct, and Section 17(a) of the Exchange Act, 15 U.S.C. § 78q (a), and Rule 17a-3(a)(6) thereunder, 17 C.F.R. § 240.17a-3(a)(6).

DEFENDANT

7. **Credit Suisse First Boston Corporation** is a broker-dealer registered with the Commission pursuant to Section 15 of the Exchange Act, 15 U.S.C. § 78o. CSFB's principal offices are located at 11 Madison Avenue, New York, New York 10010. CSFB provides the full range of services offered by a multi-purpose investment bank, including securities underwriting, sales and trading, and investment banking. CSFB has 15 branch offices in the United States. The majority of the conduct described herein occurred in the New York, Boston, and San Francisco offices.

FACTS

The Initial Public Offering Process at CSFB

8. An IPO is the first public issuance of stock from a company that has not previously been publicly traded. A "hot" IPO is one in which the stock immediately trades at a premium in the aftermarket.

9. During the period of 1999 through 2000, three business units within CSFB had primary responsibility for IPOs: the Global Investment Banking Division ("IBD"), the Equities Division, and the Global Equity Capital Markets Department ("ECM").

10. IBD typically assumed overall responsibility for an IPO from the initial engagement through the registration, marketing and pricing of the securities offered.

11. ECM was responsible for executing the distribution of an issuer's securities, including overseeing the allocation of an issuer's shares. ECM included the Syndicate Desk, which made allocation decisions for institutional accounts.

12. The Equity Sales Department provided brokerage services to CSFB's customers, including access to CSFB-ed offerings. CSFB's equity sales force included research sales people who provided CSFB's research to institutional accounts and marketed IPOs to them; institutional sales traders, who serviced institutional accounts; PCS representatives, who serviced middle market accounts; and Tech PCS representatives, who serviced middle market clients of CSFB's technology group, among other clients.

CSFB's Allocation Process

13. During the relevant time period, apart from the conduct alleged in this Complaint, CSFB regularly relied on the following criteria, among others, to make allocation decisions in IPOs: the level of business an account had done with the firm, the long or short term interest of an account in an issuer, the size of an account's anticipated long term invest-

ment, an account's track record of investment in similar issues, an account's apparent interest in the issuer as evidenced by attendance at roadshows, the account's assets under management, and the existing or potential business relationship between an account and CSFB.

14. CSFB accounts that received IPO allocations fell into two categories: institutional accounts and retail accounts. Institutional accounts ran the gamut from large mutual funds to small hedge funds and private equity funds. During the relevant time period, middle market accounts serviced by the PCS and Tech PCS group were considered retail accounts. These accounts were comprised primarily of small institutions, private equity funds, and high net worth individuals.

15. In CSFB lead-managed IPOs, more than 70% of the shares offered were typically allocated to institutional accounts from the so-called "institutional pot." During the relevant time period, the Syndicate Desk was responsible for allocating shares to institutional accounts. Institutional sales traders and research sales persons relayed information regarding their accounts' indications of interest in a particular IPO to the Syndicate Desk.

16. The PCS and Tech PCS groups were allotted specific percentages of offerings to distribute to covered accounts pursuant to understandings reached between and among ECM, PCS and Tech PCS. In PCS, managers then gave account representatives blocks of stock to allocate among their clients. Tech PCS employees allocated their shares to individual trading accounts and discretionary accounts managed by the Tech PCS group. PCS typically received 5% or less of the offering to allocate and distribute; Tech PCS typically received 3% or less to allocate and distribute.

CSFB's Profit-Sharing Practices

17. Among the reasons that investors sought to obtain IPO stock during the relevant period was the large profit to

be earned by "flipping" the shares if the IPO was successful. That is, some investors hoped to realize quick profits by selling the shares in the immediate aftermarket if the IPO traded at a premium to its offering price.

18. During 1999 and 2000, CSFB capitalized on the unprecedented growth in the new issue market and in the demand for shares in IPOs by using the IPO product to gain additional profits from certain of its smaller, less powerful Customers.

19. Employees of CSFB's ECM, PCS, and Tech PCS divisions informed Customers, both implicitly and explicitly, that they were expected to pay a portion of profits earned on their IPO flipping to CSFB in order to continue to receive allocations in "hot" IPOs.

20. Customers that refused to funnel a portion of their profits to CSFB received smaller allocations, and in some instances were denied allocations altogether. Most Customers, however, paid CSFB willingly, because of the huge profits to be made by flipping their allocations.

21. To maximize commission payments to CSFB, the Customers paid excessive commissions on off-setting trades in large capitalization, highly liquid, exchange-listed securities otherwise unrelated to the IPOs. CSFB employees sometimes assisted certain of the Customers in effecting these off-setting trades.

22. The sole purpose of this trading activity was to generate commissions for CSFB. Customers frequently executed one side of the trade with CSFB (e.g., a purchase at a commission as high as $3.15 per share) and then virtually simultaneously executed the off-setting side of the trade through another broker-dealer (e.g., a sale of the same quantity of the same stock) at the standard commission of $.06 per share.

23. On a number of occasions, both sides of the off-setting trades were executed at CSFB.

24. Although the off-setting purchases and sales were executed at similar prices, payment of significant commissions frequently resulted in net losses to the Customers. Because the trades were executed close in time, however, the transactions were not subject to significant market risk.

25. In order to eliminate any market risks associated with a change in price, some of the Customers often executed off-setting trades utilizing market-on-open or market-on-close trades. In some instances, CSFB employees suggested securities in which the Customers could execute such market-on-open or market-on-close orders.

CSFB Kept Close Watch on Customer Profits

26. CSFB generated documents designed to keep track of the profits such Customers would have earned by selling their allocations at specific times. For example, CSFB generated a document entitled the New Issue Performance Report, which measured the hypothetical profits a Customer would have generated on all CSFB products at various intervals after their purchase, as well as the commissions the Customer had paid to CSFB.

27. Certain institutional sales traders and research sales persons used information contained in the New Issue Performance Report to urge Customers to increase their payments to CSFB in exchange for IPO allocations. In some instances, CSFB personnel told Customers that they should maintain a 3:1 ratio of IPO profit to secondary business.

28. The Tech PCS group generated numerous spreadsheets showing the assumed profits Customers would have earned by selling their IPO allocations on the first day of trading, and comparing the assumed profits to secondary commissions paid to CSFB. The spreadsheets also calculated

the percentage of profits earned versus secondary commissions paid to CSFB on a year-to-date basis.

CSFB Managers and Employees Actively Participated In Profit-Sharing Practices

29. Each of the CSFB business units that participated in the IPO allocation process engaged in explicit and implicit policies and practices to obtain improper payments from Customers in exchange for allocations in hot IPOs. Participation in this conduct extended to senior levels of these business units and was widespread within the relevant business units.

30. Senior executives in managerial and supervisory roles:

- knew of the practices described in this Complaint:
- encouraged many of the practices described in this Complaint;
- directed CSFB employees to urge Customers to maintain specified ratios of commissions to IPO profits; and
- in some instances, personally engaged in some of the practices described in this Complaint.

31. The practices described in this Complaint were not isolated occurrences. Rather, these practices were a fundamental part of the manner in which CSFB dealt with a small but significant portion of its customer base. The prevalence of these practices is reflected in numerous e-mail messages and other communications, such as those set forth below.

32. On November 10, 1999 the head of one business unit told the head of another business unit "we should feed [Customers] they are paying us 35% on deal day."

33. One of these business unit heads characterized allocations as "free money" for the Customers. Employees in this

business unit were given information from the New Issue Performance Report and advised when ratios of IPO profit to secondary business for certain Customers were too high. Employees were directed to tell Customers with high ratios that they needed to increase their business to bring the ratio down.

34. This business unit head told one of his employees that market-on-open orders were used by certain Customers to generate commissions to obtain IPO allocations. He said that market-on-open orders allow Customers to minimize risk while increasing the commissions paid to CSFB.

35. A senior manager described one Customer as being on "the 4 to 1 plan which is generous. This should be really easy and painless. . . . [Customer] simply needs to be told what we have made him vs. what he has paid us. . . . ." In a subsequent e-mail, another senior manager asked "what did he pay us in Jan secondary and how much did he make."

36. CSFB sales traders told Customers that they were expected to pay for IPO stock. For example, one sales trader told a Customer "okay we got another screaming deal and I weasled you guys some stock we've yet to see any leverage out of your guys for the free dough-re-me does it make sense for me . . . to continue to feed your guys with deal stock or should I take the stock to someone who will pay us direct for the allocation."

37. In at least one instance, a CSFB employee directed the flipping activity in a Customer's account in order to ensure that the Customer paid an appropriate amount of its profits to CSFB. The Customer had complained to the employee that he was receiving small IPO allocations. The employee told the Customer that the Customer was not paying back a sufficient amount of profits to CSFB. The employee stated that CSFB expected Customers to pay one-third of their profits back in commissions in return for allocations. Because the Customer believed CSFB was overestimating

his profits, he directed the employee to sell the IPO shares for him and retain one-third of the profits in commissions. The employee agreed. Thereafter, the employee sold the Customer's IPO shares. The employee and Customer engaged in telephone conversations at the end of the trading day to finalize the commissions to be placed on trades to reach the one-third level.

38. The Customer subsequently stopped receiving IPO allocations. Upon asking the employee the reason, the Customer was told that he was required to return fifty percent of his trading profits to receive allocations. The Customer refused and did not receive any further allocations.

39. In another business unit, a senior manager asked customers to place $.50 per share commissions or "put 2%" on trades when Customers had done well in an IPO. The same senior manager regularly called his best Customer to suggest large capitalization, liquid securities for the Customer to trade in order to generate commissions to pay to CSFB.

40. In another instance, an employee in this business unit told a Customer to return from vacation to generate sufficient profits to pay to CSFB in order to receive allocations in upcoming IPOs. The same employee often called the same customer in advance of hot IPOs and said he wanted 50% of the Customer's profit in order to receive IPO allocations in those particular deals.

41. In another business unit, Customers were specifically told that they were expected to pay back fifty percent of their profits to CSFB in order to receive IPO allocations.

42. Employees in this business unit called their Customers on at least a monthly basis and told them that CSFB expected them to pay fifty percent of their IPO profits to CSFB. This business unit aggressively enforced the fifty percent requirement, which was later increased to sixty-five per-

cent. Customers that refused to increase their payments to CSFB were cut off from IPO allocations.

43. For example, on February 10, 2000 a CSFB sales trader in this business unit informed a senior salesman in the unit that the sales trader had spoken to a Customer and "told him that he was very far behind on his commissions and that we expect a 65% return on all money that we make him. I said that he still owes us for the LNUX deal not to mention the deals that have come since then. I then stated that he can do trades to increase his commissions but he will be further cut off from any syndicate in the future." The senior salesman responded "out." The sales trader responded "done."

44. Because of the profits to be made by flipping IPO shares, certain Customers created false corporate identities and often misrepresented the amount of their assets under management and the source of their wealth in order to appear to be larger, institutional accounts, worthy of receiving IPO allocations. CSFB failed to conduct due diligence regarding these Customers to verify that the information supplied on Customers' account opening forms, such as the Customer's identity and amount of assets under management, was accurate.

45. Some CSFB employees were aware of practices described in paragraph 44. For example, an employee in the PCS group told one of his Customers to open a second account using a new corporate identity. The Customer already received allocations through the Institutional Sales Group but opened a second account in order to receive allocations from the PCS group.

The Payments to CSFB Were Significant

46. Customers generally paid commissions of five to six cents per share for transactions executed at CSFB. In order to funnel IPO profits to CSFB, the Customers placed a wide range of excessive commissions on certain trades, frequently paying 10, 20 or even 30 times a normal commission

rate. The Customers also paid excessive markups and mark-downs on transactions in over-the-counter securities.

47. For example, in July 1999, CSFB served as the lead underwriter for several "hot" IPOs including Gadzoox Networks ("Gadzoox") and MP3.com ("MP3").

48. Gadzoox opened on July 20, 1999 and closed at a price of $74.8125, over 256 percent above its IPO price of $21. CSFB, as lead managing underwriter, distributed approximately 3.4 million shares of the 4.025 million Gadzoox shares offered. Of the 3.4 million Gadzoox shares distributed by CSFB, at least 261,025 shares were allocated to Customers that were willing to funnel a portion of their IPO profits to CSFB.

49. MP3 opened on July 21, 1999 and closed at a price of $63.3125, over 126 percent above its IPO price of $28. CSFB distributed 7.2 million of the 10.35 million MP3 shares offered through underwriters. Of the 7.2 million MP3 shares distributed by CSFB, at least 520,170 shares were allocated to Customers that were willing to funnel a portion of their IPO trading profits to CSFB.

50. In order funnel profits to CSFB, the Customers that had received allocations of shares in these two IPOs engaged in large transactions in highly liquid large capitalization securities at excessive commission rates. For example, over the three-day period of July 19, 1999 through July 21, 1999, one of the PCS Customers that had received a 4,000 share allocation of Gadzoox and a 10,000 share allocation of MP3 from CSFB paid CSFB at least $425,700 by making the following trades:

Date	Commission Per Share	Security	Number of Shares
7/19/99	$1.00	Coca Cola	25,000
7/20/99	$1.00	Coca Cola	69,700

7/21/99	$1.00	Coca Cola	31,000
7/21/99	$1.00	Conoco	250,000
7/21/99	$1.00	Allstate	25,000
7/21/99	$1.00	Philip Morris	25,000

51. Similarly, on July 19, 1999 a Tech PCS Customer that had received a 2,500 share allocation of Gadzoox and a 5,500 share allocation of MP3 from CSFB paid at least $124,000 to CSFB by engaging in the following transactions:

Date	Commission Per Share	Security	Number of Shares
7/19/99	$ .50	AT&T	50,000
7/19/99	$ .50	IMC	10,000
7/20/99	$ .63	Philip Morris	40,000
7/20/99	$ .75	AT&T	20,000
7/21/99	$ .90	Compaq	60,000

52. Another PCS Customer that had received a 1,500 share allocation of Gadzoox and a 5,700 share allocation of MP3 from CSFB paid CSFB at least $183,750 by engaging in the following transactions:

Date	Commission Per Share	Security	Number of Shares
7/20/99	$ .75	Compaq	15,000
7/20/99	$ .75	Disney	30,000
7/21/99	$1.00	Allstate	25,000
7/21/99	$1.00	Wells Fargo	30,000
7/21/99	$1.00	Disney	30,000

7/21/99	$1.00	Philip Morris	20,000
7/21/99	$1.00	Pfizer	30,000
7/21/99	$ .50	K Mart	30,000

53. Another Tech PCS Customer that had received a 2,000 share allocation of Gadzoox and a 5,000 share allocation of MP3 from CSFB paid CSFB at least $187,875 by engaging in the following transactions:

Date	Commission Per Share	Security	Number of Shares
7/20/99	$ .75	Chase Manhattan	5,000
7/20/99	$ .75	Genentech	4,000
7/20/99	$ .75	Cendant	26,000
7/20/99	$ .75	Compaq	9,000
7/20/99	$ .75	Hewlett Packard	6,000
7/20/99	$ .75	IBM	11,000
7/20/99	$ .75	Lucent	14,000
7/21/99	$ .75	Citigroup	84,500
7/21/99	$ .75	Tyco	4,000
7/21/99	$ .75	Disney	7,000
7/21/99	$ .75	MedPartners	21,000
7/21/99	$ .75	Pepsico	16,000
7/21/99	$ .75	AT&T	8,000
7/21/99	$ .75	Compaq	35,000

54. Some of the most dramatic instances of improper profit-sharing occurred in connection with the VA Linux Systems, Inc. ("Linux") IPO. CSFB, as lead underwriter, distributed approximately 4.1 million shares of the 5.060 million shares offered through underwriters. The Linux IPO was priced at $30 per share. The IPO opened on December 9, 1999 and closed at a price of $239.25 per share, an unprecedented increase of over 697 percent. In order to funnel IPO profits to CSFB, Customers that received at least 405,398 shares engaged in large transactions in highly liquid large capitalization securities at excessive commission rates.

55. The El Sitio IPO also opened on December 9, 1999 and closed at a price of 33.125, 108 percent above its offering price. As lead underwriter, CSFB distributed 7.5 million shares of the 9.43 million shares distributed by underwriters. CSFB distributed at least 627,378 shares to Customers willing to funnel a portion of their profits to CSFB.

56. For example, on December 9, 1999, an Institutional Customer that had received a 13,500 share allocation of Linux and a 20,000 share allocation of El Sitio from CSFB paid CSFB $1 million by placing a commission of $.50 per share on 2 million shares of Compaq.

57. A Tech PCS Customer that had received an 8,000 share allocation of Linux and a 30,000 share allocation of El Sitio from CSFB paid CSFB at least $819,800 by engaging in the following transactions:

Date	Commission Per Share	Security	Number of Shares
12/9/99	$ 2.00	EMC	50,000
12/9/99	$ 2.00	General Electric	85,000
12/9/99	$ 2.00	IBM	50,000
12/9/99	$ 1.50	Nokia	90,000

12/9/99	$ 1.00	Ford	50,000
12/9/99	$ 1.00	General Motors	20,000
12/9/99	$ 1.00	Home Depot	45,000
12/9/99	$ 1.00	Proctor & Gamble	40,000
12/10/99	$ .94	Sprint	45,000
12/10/99	$ .94	AT&T	45,000
12/10/99	$ .94	Time Warner	40,000
12/10/99	$ .94	Tyco	40,000

58. Another Institutional Customer that had received a 12,500 share allocation of Linux from CSFB paid CSFB at least $565,000 by engaging in the following transactions:

Date	Commission Per Share	Security	Number of Shares
12/9/99	$ 2.75	AT&T	50,000
12/9/99	$ 2.70	Citigroup	50,000
12/9/99	$ 1.25	Compaq	100,000
12/9/99	$ .50	K Mart	50,000
12/9/99	$ .80	Kroger Co.	100,000
12/10/99	$ .50	Kroger Co.	125,000

59. Another Institutional Customer that had received an 8,500 share allocation of Linux from CSFB paid CSFB at least $402,650 by engaging in the following transactions.

Date	Commission Per Share	Security	Number of Shares
12/9/99	$ .48	America Online	50,000
12/9/99	$ .19	K Mart	150,000
12/9/99	$ .48	Citigroup	200,000
12/9/99	$ .43	Disney	150,000
12/9/99	$ .22	Kroger	120,000
12/9/99	$ .48	National Semicon-ductor	20,000
12/9/99	$ .38	Tyco	150,000
12/10/99	$ .29	America Online	20,000
12/10/99	$ .29	Lucent	20,000
12/10/99	$ .29	Micron	10,000
12/10/99	$ .29	National Semicon-ductor	10,000
12/10/99	$ .29	Citigroup	100,000
12/10/99	$ .29	Disney	50,000
12/10/99	$ .29	Tyco	100,000
12/10/99	$ .15	K Mart	45,000

60. Another Institutional Customer that received a 12,500 share allocation of Linux and a 10,000 share allocation of El Sitio from CSFB paid CSFB $438,960 on December 9, 1999 and $295,600 on December 10. This Customer paid commissions as high as $3 per share and executed its

off-setting trades at CSFB. On December 9, the Customer bought 38,000 shares of IBM at a price of 113 and paid a commission of $2.85 per share. On the same day, the Customers sold 36,000 shares of IBM at a price of 119.54 and paid a commission of $3 per share. On December 10, the Customer bought 25,000 shares of Time Warner at a price of 67.5 and paid a commission of $1.68 per share. On the same day, the Customer sold 25,000 shares of Time Warner at a price of $68 per share and paid a commission of $1.68 per share.

61. CSFB also shared in the profits of its Customers in connection with the two IPOs that opened on March 9, 2000, Selectica and OTG Software ("OTG").

62. The Selectica IPO closed at a price of $141.23, over 370 percent above its offering price of $30. CSFB, as lead managing underwriter, distributed approximately 3.9 million shares of the 4.6 million Selectica shares offered. Customers who were willing to pay a portion of their profits to CSFB received at least 324,903 shares in the Selectica IPO.

63. The OTG IPO closed at $56.18, over 195 percent above its offering price of $19. As lead underwriter, CSFB distributed approximately 4.9 million of the 5.75 million OTG shares offered. Customers who were willing to pay a portion of their profits to CSFB received at least 471,312 shares in the OTG IPO.

64. An Institutional Customer that had received a 5,000 share allocation of Selectica and a 10,000 share allocation of OTG paid CSFB at least $278,600 by engaging in the following transactions:

Date	Commission Per Share	Security	Number of Shares
3/10/00	$ .38	American Home Prod-ucts	65,000
3/10/00	$ .38	America Online	70,000
3/10/00	$ .38	Citigroup	80,000
3/10/00	$ .38	Pfizer	200,000
3/10/00	$ .38	AT&T	125,000
3/10/00	$ .38	Tyco	60,000
3/10/00	$ .38	US West	80,000
3/10/00	$ .38	Charles Schwab	10,000
3/10/00	$ .29	Xerox	50,000
3/10/00	$ .19	Edison	10,000

65. Another Institutional Customer that had received a 5,000 share allocation of Selectica and a 10,000 share allocation of OTG from CSFB paid CSFB $178,000 by engaging in the following transactions:

Date	Commission Per Share	Security	Number of Shares
3/10/00	$ .60	Lucent	70,000
3/10/00	$ .60	Pfizer	50,000
3/10/00	$ .60	AT&T	80,000
3/10/00	$ .40	Compaq	100,000
3/10/00	$ .18	Mattel	100,000

66. A Tech PCS Customer that had received a 7,000 share allocation of Selectica and a 15,000 share allocation of OTG from CSFB paid CSFB at least $166,000 by engaging in the following transactions:

Date	Commission Per Share	Security	Number of Shares
3/10/00	$ .75	IBM	50,000
3/10/00	$ .75	Qwest	50,000
3/10/00	$ .75	US West	50,000
3/10/00	$ .60	Ford	10,000
3/10/00	$ .60	Federal National Mortgage Association	50,000
3/10/00	$ .35	Phillip Morris	50,000

67. The payments described in paragraphs 46 through 66 are representative examples of CSFB's practices during the relevant period.

68. CSFB recorded the payments described in paragraphs 46 through 66 as commissions when, in fact, the payments were made as profit-sharing in exchange for IPO allocations.

69. The Commission understands that, simultaneously with the filing of this Complaint, CSFB is entering into a Letter of Acceptance, Waiver and Consent ("AWC") with NASD Regulation, Inc. ("NASD Regulation") arising from the same matters alleged herein. In addition to the remedies imposed in the AWC, the relief sought by the Commission pursuant to this Complaint is necessary and appropriate in the

public interest and for the protection of investors, within the meaning of Section 21(f)(2) of the Exchange Act.

FIRST CLAIM FOR RELIEF
CSFB VIOLATED RULE 2110 OF THE CONDUCT RULES OF THE NASD

70. Paragraphs 1 through 69 are realleged and incorporated herein by reference.

71. NASD Conduct Rule 2110 requires members to observe high standards of commercial honor and just and equitable principles of trade.

72. CSFB violated Rule 2110 by engaging in the conduct described in paragraphs 1 through 69 above.

SECOND CLAIM FOR RELIEF
CSFB VIOLATED RULE 2330 OF THE NASD RULES OF PRACTICE

73. Paragraphs 1 through 69 are realleged and incorporated herein by reference.

74. NASD Conduct Rule 2330(f) prohibits a member or any person associated with a member from sharing directly or indirectly in the profits or losses of a customer, unless certain conditions not applicable here are met.

75. As described in paragraphs 1 through 69, from at least April 1999 through June 2000, CSFB shared directly or indirectly in the profits or losses in accounts of customers carried by CSFB, in violation of Rule 2330 (f).

THIRD CLAIM FOR RELIEF
CSFB VIOLATED SECTION 17(a) OF THE EXCHANGE ACT, 15 U.S.C. § 78q(a) AND RULE 17a-3(a)(6) THEREUNDER

76. Paragraphs 1 through 69 are realleged and incorporated herein by reference.

77. As alleged above, commencing in or about April 1999, CSFB, while it was, among other things, a broker and

dealer transacting a business in securities through the medium of members of national securities exchanges and a broker and dealer registered with the Commission pursuant to Section 15 of the Exchange Act, 15 U.S.C. § 78o, failed to accurately make and keep for prescribed periods such records, furnish such copies thereof and make, disseminate and file such reports as the Commission by rule, has prescribed as necessary and appropriate in the public interest and for the protection of investors.

78. Rule 17a-3, 17 C.F.R § 240.17a-3(a)(6), requires a broker-dealer to maintain a record of each order received for the purchase and sale of a security that includes the terms and conditions, including, but not limited to, the commission, mark-up, or mark-down associated with such order.

79. As described above, CSFB failed to reflect accurately the terms and conditions of its orders because it failed to record that the commissions, markups and markdowns paid by certain Customers were profit-sharing in exchange for IPO allocations.

80. By reason of the foregoing, CSFB directly and indirectly violated, and unless enjoined will again violate, Section 17(a) of the Exchange Act, 15 U.S.C. § 78q(a), and Rule 17a-3(a)(6) thereunder, 17 C.F.R. § 240.17a-3(a)(6).

RELIEF SOUGHT

WHEREFORE, plaintiff Commission respectfully requests that this Court enter judgment:

1. permanently restraining and enjoining CSFB, directly or indirectly, from violating Rules 2110 and 2330 of the NASD Conduct Rules and Section 17 (a) Exchange Act, 15 U.S.C. § 78q and Rule 17a-3, 17 C.F.R § 240.17a-3 thereunder;

2. directing CSFB to disgorge the ill-gotten gains obtained from its conduct, plus prejudgment interest thereon;

3. requiring CSFB to pay a civil penalty pursuant to Section 21(d) of the Exchange Act, 15 U.S.C. § 78u(d);

4. issue an order requiring CSFB to institute policies and procedures to prevent the violations described herein from occurring in the future and retain an independent consultant to audit CSFB's allocation procedures;

5. granting such other and further relief as the Court may deem just and proper; and

6. retaining jurisdiction of this action in order to implement and carry out the terms of any Orders which may be entered herein.

Dated: January 22, 2002

Respectfully submitted,

/s/ Wayne M. Carlin

WAYNE M. CARLIN
(WC 2114)
Attorney for Plaintiff
SECURITIES AND EXCHANGE COMMISSION
Northeast Regional Office
233 Broadway
New York, New York 10279
(646) 428-1510

Of Counsel:

Edwin H. Nordlinger
Mark K. Schonfeld
Caren Nelson Pennington
Doria G. Stetch
William J. Stellmach
Michael D. Wasserman

All attorneys listed are covered by LCvR 83.2(e) as attorneys employed by an agency of the United States.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE: INITIAL PUBLIC OFFERING ANTITRUST LITIGATION	:	Case No. 01 CIV. 2014 (WHP)
Pfeiffer, Plaintiff v. Credit Suisse First Boston Corp., et al., Defendants	:	Case No. 01 CIV. 11420 (WHP) Order

WILLIAM H. PAULEY III, District Judge:

The motion of plaintiff Milton Pfeiffer for an order permitting him to assert a claim under Section 2(c) of the Robinson-Patman Act, 15 U.S.C. Section 13(c), was heard on May 16, 2002.

Having heard oral argument from Plaintiff Pfeiffer's counsel, the Executive Committee, and Defendants' counsel in the Initial Public Offering Antitrust Litigation, and having considered the papers filed by the parties, the Court grants Plaintiff Pfeiffer permission to prosecute his separate action asserting a claim under the Robinson Patman Act on a coor-

dinated basis, so as to avoid any duplication on the part of the parties or the Court. Plaintiff Pfeiffer need not re-file the Robinson-Patman Act complaint; and prior service in Case No. 01-Civ.-11420 (S.D.N.Y.) (WHP) shall be deemed applicable to action authorized by this order.

The Pfeiffer action is stayed pending determination of the Defendants' omnibus motion to dismiss the Consolidated Amended Complaint filed by the Executive Committee. If the Court's ruling on that motion does not dispose of Pfeiffer's action, Defendants in the Pfeiffer action shall be entitled to move to dismiss the Pfeiffer complaint with respect to any issues raised specifically by that complaint.

The actions are otherwise to proceed on the time schedule established by this Court.

Dated: June 4, 2002
New York, New York

SO ORDERED:

/s/ William H. Pauley
William H. Pauley III
U.S.D.J.

IN THE SUPREME COURT OF THE UNITED STATES

CREDIT SUISSE FIRST BOSTON LTD., ET AL.,

Petitioners,

v.

GLEN BILLING, ET AL.,

Respondents.

No. 05-1157

December 7, 2006

The motion of NYSE Group, Inc. for leave to file a brief as *amicus curiae* is granted. The motion of National Association of Securities Dealers, Inc. for leave to file a brief as *amicus curiae* is granted. The motion of Securities Industry Association, et al. for leave to file a brief as *amici curiae* is granted. The petition for a writ of certiorari is granted. The Chief Justice took no part in the consideration or decision of these motions and this petition.

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No. 05-1157

In the Supreme Court of the United States

CREDIT SUISSE SECURITIES (USA) LLC, ET AL.,

Petitioners,

v.

GLEN BILLING, ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR PETITIONERS

ROBERT B. MCCAW
LOUIS R. COHEN
ALI M. STOEPPELWERTH
FRASER L. HUNTER, JR.
NOAH A. LEVINE
WILMER CUTLER PICKERING HALE & DORR LLP
399 Park Avenue
New York, New York 10022
(212) 230-8800
Attorneys for Petitioner Citigroup Global Markets Inc.

STEPHEN M. SHAPIRO
Counsel of Record
KENNETH S. GELLER
TIMOTHY S. BISHOP
JOHN P. SCHMITZ
MAYER, BROWN, ROWE & MAW LLP
1909 K Street, N.W.
Washington, D.C. 20006
(202) 263-3000
Attorneys for Petitioner Merrill Lynch, Pierce, Fenner & Smith Incorporated

Counsel for Petitioners
[Additional Counsel Listed On Signature Page]

QUESTION PRESENTED

Whether, in a private treble damages action under the antitrust laws challenging underwriter conduct during highly regulated public offerings of securities, the standard for implying antitrust immunity is the potential for conflict with the securities laws, as this Court has held, or a specific expression of congressional intent to immunize such conduct and a showing that the SEC has power to compel the specific practices at issue, as the Second Circuit held.

RULES 24.1(b) AND 29.6 STATEMENT

In these consolidated cases, plaintiffs (respondents here) are Glen Billing, Mita Aggarwal, Tom Barnett, David Pazarella, Henry Sklanowsky, Ross Wiczer, Wayne H. Jones, Efriam Simcha, Robert H. Thomas, Robert Grovich, Binh Nguyen, Michael S. Weiss, Kenneth Shives, Demetrios Petratos, Deming Zhous, Brad Harrison, Bert Zauderer, Glenn Kerr, Hans Reihl, Heinz Wahl, Bruce J. Jiorle, Mark Sculnick, Susan Katz, Anthony Voto, Estelle L. Augustine, Don K. Burris, Rachel Schwartz, Milton Pfeiffer, Roderick Lau, Raymond Litwin, Joe Braswell, Buddy Dukeman, Anupkumar Bhasin, Anita S. Budich, Troy Brooks, Philip Warner, Carlos Reeberg, Jerry Cobb, David Federico, Farideh Sigari, Matthew Weiner, Joe Goldgrab and Local 144 Nursing Home Pension Fund.

Defendants (petitioners here) are:

Bear, Stearns & Co. Inc. The Bear Stearns Companies Inc., a publicly held corporation, is the parent company of Bear, Stearns & Co. Inc. No other publicly held corporation owns 10% or more of the stock of Bear, Stearns & Co. Inc.

Citigroup Global Markets Inc. Citigroup Global Markets Inc. (formerly known as Salomon Smith Barney Inc.) is a wholly owned subsidiary of Citigroup Financial Products Inc. (formerly known as Salomon Brothers Holding Company Inc.), which is a wholly owned subsidiary of Citigroup Global Markets Holdings Inc. (f/k/a Salomon Smith Barney Holdings Inc.), which is a wholly owned subsidiary of Citigroup Inc.

Comerica, Inc. Comerica, Inc. has no parent corporation and no publicly held corporation owns 10% or more of its stock.

Credit Suisse Securities (USA) LLC (formerly named Credit Suisse First Boston LLC). Credit Suisse Securities (USA) LLC is a wholly owned subsidiary of Credit Suisse

(USA), Inc. (formerly named Credit Suisse First Boston (USA), Inc.), a public reporting company that has certain publicly traded securities and which is a wholly owned subsidiary of Credit Suisse Holdings (USA), Inc. (formerly named Credit Suisse First Boston, Inc.). Credit Suisse Holdings (USA), Inc. is a jointly owned subsidiary of Credit Suisse Group, the shares of which are publicly traded on the Swiss Stock Exchange, and Credit Suisse (formerly named Credit Suisse First Boston), which itself is a wholly owned subsidiary of Credit Suisse Group. Except as described above, Credit Suisse Securities (USA) LLC has no subsidiaries or affiliates that are publicly held, and no publicly held corporation owns 10% or more of the stock of Credit Suisse Securities (USA) LLC.

Deutsche Bank Securities Inc. Deutsche Bank Securities Inc. (formerly known as Deutsche Banc Alex. Brown Inc.) ("DBSI") has the following corporate parents: Deutsche Bank AG, Taunus Corporation, and DB U.S. Financial Markets Holding Corporation. Other than the aforementioned corporate parents, there is no publicly held corporation that owns 10% or more of DBSI's stock.

Fidelity Distributors Corp.; Fidelity Brokerage Services LLC; Fidelity Investments Institutional Services Co., Inc. Fidelity Distributors Corp. and Fidelity Investments Institutional Services Co., Inc. are direct subsidiaries of FMR Corp., a Delaware corporation that is privately held. Fidelity Brokerage Services LLC is wholly owned by Fidelity Global Brokerage Group, Inc., an entity that is, in turn, wholly owned by FMR Corp., a Delaware corporation that is privately held. In addition, other entities wholly owned by FMR Corp. have contractual relationships to distribute, administer, manage, and advise the Fidelity family of mutual funds.

Goldman, Sachs & Co. Goldman, Sachs & Co. is a subsidiary of the Goldman Sachs Group, Inc., which owns 10% or more of its partnership units. No other publicly held com-

pany owns 10% or more of the partnership units of Goldman, Sachs & Co.

The Goldman Sachs Group, Inc. The Goldman Sachs Group, Inc. has no parent corporations and no publicly held companies own 10% or more of its common stock.

Janus Capital Management LLC. Janus Capital Management LLC is owned by Janus Capital Group Inc., the shares of which are publicly traded on the New York Stock Exchange. No other publicly held company owns 10% or more of the stock of Janus Capital Management LLC.

Lehman Brothers Inc. Lehman Brothers Inc. is a wholly owned subsidiary of Lehman Brothers Holdings Inc., the shares of which are traded on the New York Stock Exchange. No other company owns 10% or more of the stock of Lehman Brothers Inc.

Merrill Lynch, Pierce, Fenner & Smith Incorporated. Merrill Lynch & Co., Inc. is the parent company of Merrill Lynch, Pierce, Fenner & Smith Incorporated. Merrill Lynch & Co., Inc. is a publicly held company whose shares are traded on the New York Stock Exchange. No other publicly held company owns 10% or more of the stock of Merrill Lynch, Pierce, Fenner & Smith Incorporated.

Morgan Stanley & Co. Incorporated. Morgan Stanley & Co. Incorporated is a wholly owned subsidiary of Morgan Stanley.

Robertson Stephens, Inc. Robertson Stephens, Inc.'s ultimate parent company, Bank of America Corporation, issues shares registered with the Securities and Exchange Commission for public trading. No other parent companies, subsidiaries, or affiliates of Robertson Stephens, Inc. issues shares to the public. No other publicly held company owns 10% or more of the stock of Robertson Stephens, Inc.

Van Wagoner Capital Management, Inc. Van Wagoner Capital Management, Inc. has no parent corporations

and no publicly held companies own 10% or more of its common stock.

Van Wagoner Funds, Inc. Van Wagoner Funds, Inc., a mutual fund entity, has no parent corporations. The following publicly held entities own 10% or more of any of its series of shares: (i) Van Wagoner Small Cap Growth Fund: Charles Schwab & Co., Inc. and National Financial Services Corp.; (ii) Van Wagoner Emerging Growth Fund: Charles Schwab & Co., Inc. and National Financial Services Corp. Charles Schwab & Co., Inc. and National Financial Services Corp. hold such shares as broker-dealers on behalf of their underlying customers. No other publicly held company owns 10% or more of the stock of Van Wagoner Funds, Inc.

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Blue Chip Stamps v. *Manor Drug Stores*, 421 U.S. 723 (1975) 39

Brown v. *Pro Football, Inc.*, 518 U.S. 231 (1996) 22, 44, 46, 50

Central Bank of Denver v. *First Interstate Bank*, 511 U.S. 164 (1994) 40

Davis v. *Scherer*, 468 U.S. 183 (1984) 44

Dura Pharm., Inc. v. *Broudo*, 544 U.S. 336 (2005) 21, 39

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Far East Conf. v. *United States*, 342 U.S. 570 (1952) 47

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Geneva Pharm. Tech. Corp. v. *Barr Labs.*, 386 F.3d 485 (2d Cir. 2004) 23

Gordon v. *New York Stock Exch., Inc.*, 422 U.S. 659 (1975) ..... *passim*

Initial Pub. Offering Sec. Litig., In re, 241 F. Supp. 2d 281 (S.D.N.Y. 2003) 7

Kirsch v. *Fleet Street, Ltd.*, 148 F.3d 149 (2d Cir. 1998) 49

Mandarino v. *Mandarino*, 180 Fed. Appx. 258, 2006 WL 1308076 (2d Cir. May 11, 2006) 49

Merrill Lynch, Pierce, Fenner & Smith, Inc. v. *Dabit*, 126 S. Ct. 1503 (2006) 27, 40, 41

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Miles v. *Merrill Lynch & Co.*, 471 F.3d 24 (2d Cir. 2006) 7

National Gerimedical Hosp. & Gerontology Ctr. v. *Blue Cross of Kansas City*, 452 U.S. 378 (1981) 34, 35, 36

National Soc'y of Prof'l Eng'rs v. *United States*, 435 U.S. 679 (1978) 50

Otter Tail Power Co. v. *United States*, 410 U.S. 366 (1973) 34, 35

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Phonetele, Inc. v. *AT&T Co.*, 664 F.2d 716 (9th Cir. 1981) 34

Santa Fe Indus. v. *Green*, 430 U.S. 462 (1977) 40

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Texas Indus. v. *Radcliff Materials*, 451 U.S. 630 (1981) 37, 40

Town of Concord v. *Boston Edison Co.*, 915 F.2d 17 (1st Cir. 1990) 47

TSC Indus. v. *Northway, Inc.*, 426 U.S. 438 (1976) 40

Ultramares Corp. v. *Touche, Niven & Co.*, 255 N.Y. 170 (1931) 39

United States v. *National Ass'n of Securities Dealers, Inc.*, 422 U.S. 694 (1975) ..... *passim*

United States v. *Philadelphia Nat'l Bank*, 374 U.S. 321 (1963) 34, 35

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Van Buskirk v. *N.Y. Times Co.*, 325 F.3d 87 (2d Cir. 2003) 49

Verizon Communications Inc. v. *Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004) ..... *passim*

Walton v. *Morgan Stanley & Co.*, 623 F.2d 796 (2d Cir. 1980) 49

Statutes, Regulations, and Rules:

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15 U.S.C. § 77a 1

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15 U.S.C. § 78o(c) 8, 28

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15 U.S.C. § 78s(b) 8, 28

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15 U.S.C. § 78u-4(a) 40

15 U.S.C. § 78u-4(b) 40

15 U.S.C. § 78u-4(c) 7

15 U.S.C. § 78u-4(f) 40

15 U.S.C. § 78w(a) 9, 28, 29

15 U.S.C. § 78bb 7, 39

15 U.S.C. § 78bb(a) 33

15 U.S.C. § 78bb(f) 40

15 U.S.C. § 78mm 31

15 U.S.C. § 80a-22f 28

18 U.S.C. § 1964(c) 39

28 U.S.C. § 1254(1) 1

Securities Acts Amendments of 1975, Pub. L. No. 94-29, 89 Stat. 97 (1975) 10

17 C.F.R. § 229.508(e) 11, 30

17 C.F.R. § 230.134 11

17 C.F.R. § 230.461(a) 11

17 C.F.R. § 230.461(b) 11

17 C.F.R. § 240.10b 11

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17 C.F.R. § 240.15c1 11

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17 C.F.R. § 242.104 ..... 12, 30

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NASD Rule 2110 ..... 14, 15, 31

Miscellaneous:

1A PHILLIP AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW (3d ed. 2006) 36

PHILLIP AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW (Supp. 2006) 31, 41, 44

Atkins, *Remarks Before the Federalist Society* (Sept. 21, 2006), available at http://www.sec.gov/news/speech/2006/spch092106psa.htm 41

Austin, *The Jury System at Risk from Complexity, the New Media, and Deviancy*, 73 DENV. U.L. REV. 51 (1995) 50

Carter & Dark, *Underwriter Reputation and IPOs: The Detrimental Effect of Flippers*, 28 FIN. REV. 279 (1993) 4

Crocker, *The Initial Public Offering Process*, 955 PLI/Corp. 385 (1996) 3, 4

Department of Enforcement v. *Invemed Assocs.*, No. CAF-030014 (NASD Office of Hearing Officers Mar. 3, 2006) (appeal pending), available at http://www.nasd.com/RegulatoryEnforcement/Adjudication/OfficeofHearingOfficersDecisionsand

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Proceedings/OHORedactedDisciplinaryDecisions/2006Decisions/NASDW_017083 .....5, 15, 30, 46

Easterbrook, *Ignorance and Antitrust*, in ANTITRUST, INNOVATION, AND COMPETITIVENESS 119 (Thomas Jorde & David Teece, eds., 1992) 47

Easterbrook, *The Limits of Antitrust*, 63 TEX. L. REV. 1 (1984) 50

KENNETH ELZINGA & WILLIAM BREIT, THE ANTITRUST PENALTIES (1976) 38

H.R. CONF. REP. NO. 104-369 (1995) 39

H.R. REP. NO. 73-1383 (1934) 9, 28, 39

Hale & Hale, *Competition or Control VI: Application of Antitrust Laws to Regulated Industries*, 111 U. PA. L. REV. 46 (1962-1963) 29

HERBERT HOVENKAMP, THE ANTITRUST ENTERPRISE: PRINCIPLE AND EXECUTION (2005) 50

Hovenkamp, *Antitrust Violations in Securities Markets*, 28 J. CORP. L. 607 (2003) 38

Hylton, *When Should a Case be Dismissed? The Economics of Pleading and Summary Judgment Standards* (AEI-Brookings Jt. Center for Reg. Studies, Apr. 2006) 38

Letter from Marc Menchel to Katherine England Regarding Proposed Rule Governing Allocations and Distributions of Shares in IPOs, amend. No. 2 (Aug. 4, 2004), available at http://www.nasd.com/web/groups/rules_regs/documents/rule_filing/nasdw_010729.pdf 14

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1 LOUIS LOSS, JOEL SELIGMAN, & TROY PAREDES, SECURITIES REGULATION (4th ed. 2006) 3, 5

NASD Manual, available at http://nasd.complinet.com/nasd/display/index.html.....11, 28

NASD Notice to Members No. 02-55 (Aug. 2002), available at http://www.nasd.com/RulesRegulation/NoticestoMembers/2002NoticestoMembers/NASDW_003491 14

NASD Notice to Members No. 03-72 (Nov. 2003), available at http://www.nasd.com/RulesRegulation/NoticestoMembers/2003NoticestoMembers/NASDW_003066.....14

NYSE/NASD IPO ADVISORY COMMITTEE, REPORT AND RECOMMENDATIONS (May 2003), available at http://www.nasd.com/RulesRegulation/PublicationsGuidance/ReportsandStudies/index.htm 13

RICHARD POSNER, ANTITRUST LAW (2d ed. 2001).....38

REPORT OF THE SEC CONCERNING THE HOT ISSUES MARKETS (Aug. 1984).....12, 13, 30

REPORT OF SPECIAL STUDY OF SECURITIES MARKETS OF THE SECURITIES AND EXCHANGE COMMISSION, H.R. Doc. No. 88-95, Pt. 1 (Apr. 1963) 4, 12, 30

S. REP. NO. 73-792 (1934).....9, 28, 39

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Schumer & Bloomberg, *To Save New York, Learn From London*, WALL ST. J., Nov. 1, 2006, at A18.....37

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SEC, Comments on NYSE and NASD Rulemaking, available at http://sec.gov/rules/sro/nyse/nyse 200412.shtml 14

SEC Div. of Market Regulation, Staff Legal Bulletin No. 10: *Prohibited Solicitations and "Tie-in" Agreements for Aftermarket Purchases* (Aug. 25, 2000), available at http://www.sec.gov/ interps/legal/slbmr10.htm 12, 13

SEC, *IPOs: Why Individuals Have Difficulty Getting Shares*, available at http://www.sec.gov/ answers/ipodiff.htm 4, 5

SEC Litig. Release No. 17327 (Jan. 22, 2002), available at http://sec.gov/litigation/litreleases/ lr17327.htm 15

SEC Litig. Release No. 19050 (Jan. 25, 2005), available at http://sec.gov/litigation/litreleases/ lr19050.htm 14

SEC Litig. Release No. 19051 (Jan. 25, 2005) available at http://sec.gov/litigation/litreleases/ lr19051.htm 14

SEC Release No. 34-2446 (Mar. 18, 1940) 4

SEC Release No. 34-10636, 39 Fed. Reg. 7806 (Feb. 11, 1974) 12

SEC Release No. 34-17371, 45 Fed. Reg. 83707 (Dec. 12, 1980) 10, 29

SEC Release No. 34-23170, 51 Fed. Reg. 16004 (Apr. 30, 1986) 30

SEC Release No. 34-26182, 53 Fed. Reg. 41206 (Oct. 20, 1988) 12

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SEC Release No. 34-50831, 69 Fed. Reg. 75774 (Dec. 17, 2004), *Amendments to Regulation M: Anti-Manipulation Rules Concerning Securities Offerings* 5, 30

SEC Release No. 34-50896, 69 Fed. Reg. 77804 (Dec. 20, 2004) 14

SEC Release No. 34-51500, 70 Fed. Reg. 19672 (Apr. 13, 2005), *Commission Guidance Regarding Prohibited Conduct in Connection with IPO Allocations* 1, 4, 13, 30, 45

OPINIONS BELOW

The amended opinion of the court of appeals (Pet. App. 1a-71a) is reported at 426 F.3d 130. The district court's opinion (Pet. App. 72a-122a) is reported at 287 F. Supp. 2d 497.

JURISDICTION

The judgment of the court of appeals was entered on September 28, 2005. The court of appeals issued an amended opinion on October 26, 2005. Petitioners filed a timely petition for rehearing en banc on November 2, 2005, which was denied on January 12, 2006. Pet. App. 123a. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED

Relevant provisions of the Sherman Act, 15 U.S.C. § 1 *et seq.*, Robinson-Patman Act, 15 U.S.C. § 13, Securities Act, 15 U.S.C. § 77a *et seq.*, and Securities Exchange Act, 15 U.S.C. § 78a *et seq.*, are reproduced at Pet. App. 208a-215a. The Securities and Exchange Commission's *Guidance Regarding Prohibited Conduct in Connection with IPO Allocations*, 70 Fed. Reg. 19672 (Apr. 13, 2005), is reproduced at Pet. App. 216a-233a.

STATEMENT

Plaintiffs allege that ten leading investment banks required purchasers in 900 initial public offerings of securities ("IPOs") to make "tie-in" stock purchases or to pay inflated commissions on unrelated trades as a quid pro quo for receiving shares in the offerings. Plaintiffs do not bring their claims under the federal securities laws. There are more than 300 pending suits that seek such relief. Instead, in an attempt to obtain treble damages not permitted by the securities laws and evade the requirements of the Private Securities Litigation Reform Act ("PSLRA"), plaintiffs filed these putative class actions under the Sherman Act and Robinson-Patman Act. Plaintiffs allege that investment banks "conspired" to impose "anticompetitive charges" on IPO buyers that inflated

the price at which the IPO stocks traded in the aftermarket, and that institutional investors "bribed" the banks by paying those charges. See J.A. 10-62 (reproducing complaints).

As the United States and the SEC have observed, most of the conduct that plaintiffs challenge—including the collaboration of banks in underwriting "syndicates" and discussions among underwriters and investors to facilitate the IPO process—is permitted by the securities laws and essential to public offerings. And the SEC has undisputed authority to define unlawful tie-in arrangements and excessive commissions—conduct plaintiffs also challenge—and actively exercises that authority. The district court held that in these circumstances application of the antitrust laws to conduct closely overseen by securities regulators, who have drawn fine lines between permissible and unlawful activities in these very areas, would create both actual and potential conflict with the SEC's authority. Applying standards laid down in *Gordon* v. *New York Stock Exch.*, 422 U.S. 659 (1975), and *United States* v. *National Ass'n of Securities Dealers*, 422 U.S. 694 (1975), the court held that these conflicts created plain repugnancy between the two statutory schemes. It accordingly implied immunity to permit the securities regulatory regime to function as Congress intended and dismissed the complaints.

In rejecting the SEC's position and reversing the district court, the Second Circuit constructed a novel implied immunity test requiring evidence "that Congress clearly intended a repeal of the antitrust laws" with respect to the specific conduct at issue. Pet. App. 64a. Its ruling threatens to interfere with the exercise of regulatory authority that Congress delegated to the Commission and to chill capital-raising activities critical to the Nation's economy. The threat of treble damages antitrust liability would render virtually meaningless the nuanced distinctions drawn by expert agencies and deter conduct that securities regulators have explained is necessary to capital formation. This Court should reject plaintiffs' at-

tempt to rewrite implied immunity doctrine and repackage securities claims as antitrust suits.

A. Collaboration Among Underwriters And Discussions With Investors About Their Aftermarket Intentions Are Central To Syndicated Public Offerings.

Plaintiffs' treble damages suits challenge conduct essential to "firm commitment" underwritings of new equity securities. In a firm commitment underwriting, a lead underwriter forms a syndicate with other investment banks to purchase the offering from the issuer and then resell it to investors. 1 LOUIS LOSS ET AL., SECURITIES REGULATION 492-494, 499-501 (4th ed. 2006). The issuer receives a specified amount of capital at a specified time and the syndicate bears "the risk of any inability to sell an issue" because it is priced too high or the public lacks interest in the offering. Pet. App. 4a. Firm commitment underwritings have been "the predominant structure for the public distribution of equities since the infancy of the securities markets" because they "spread the underwriting risk" and enable syndicates to conduct larger offerings than banks could underwrite individually. *Id.* at 86a-87a. Underwriter collaboration enhances the likelihood that an IPO will succeed by promoting "optimal distribution and visibility for the stock." Crocker, *The Initial Public Offering Process*, 955 PLI/Corp. 385, 392 (1996).

The "difficult task" of determining the appropriate size, price, and allocation of an IPO requires that underwriters gauge investor interest in the offering as accurately as possible. Pet. App. 6a. After a registration statement with an estimated price range for the offering is filed with the SEC, the underwriters and issuer hold meetings across the country with potential investors, as well as telephone and on-line conferences, to assess and generate demand. During this "road show," underwriters "build a book" by collecting non-binding "indications of interest" from investors for quantities of shares in the IPO at a range of prices. 1 LOSS ET AL., *supra*, at 509-510. Underwriters aim to build a book that con-

tains indications of interest that exceed the number of shares offered, which enables the lead manager to choose the best investor accounts and the optimal share allocation and offering price. Crocker, *supra*, 955 PLI/Corp at 396.

The SEC recognizes the importance of book-building "in obtaining and assessing demand for an offering and in pricing the securities." *Commission Guidance Regarding Prohibited Conduct in Connection with IPO Allocations*, Release No. 34-51500, 70 Fed. Reg. 19672 (Apr. 13, 2005) ("*Allocations Release*"), Pet. App. 225a; see Br. of the United States as Amicus Curiae in Support of Certiorari 15 ("U.S. Br."). It has specified that, to gather relevant information, underwriters may lawfully discuss with a potential investor "[t]he customer's desired long-term future position in the security," the price "at which the customer might accumulate that position," and whether and at what price the investor will "hold the securities" or "sell the shares in the immediate aftermarket" (the period after the IPO is complete). Pet. App. 224a. The SEC distinguishes between these inquiries and improper statements that "immediate aftermarket buying would help [the investor] obtain allocations of hot IPOs." *Id.* at 227a.

The scope of permissible book-building inquiries reflects the SEC's understanding that underwriters and issuers have "wide latitude in allocating IPO shares." SEC, *IPOs: Why Individuals Have Difficulty Getting Shares*, http://www.sec.gov/answers/ipodiff.htm. Underwriters generally prefer investors who will hold the security in the aftermarket over investors who will "flip" the security for a short-term profit. REPORT OF SPECIAL STUDY OF SECURITIES MARKETS OF THE SECURITIES AND EXCHANGE COMMISSION, H.R. Doc. No. 88-95, Pt. 1, at 523 (Apr. 1963). Because "flipping causes stock prices to fluctuate—usually downward"—and can destabilize the market, the SEC recognizes that it is a "serious problem" that underwriters may combat. *Friedman* v. *Salomon/Smith Barney, Inc.*, 313 F.3d 796, 797-798, 801 (2d Cir. 2002) (citing SEC Release No. 34-2446); see also Carter & Dark, *Un-*

derwriter Reputation and IPOs: The Detrimental Effect of Flippers, 28 FIN. REV. 279, 282-283 (1993); 1 LOSS ET AL., *supra*, at 507-508 & n.34. The SEC accordingly permits underwriters to inquire whether a prospective IPO buyer intends to hold or flip its allocation. Pet. App. 224a.

It is also well understood that "underwriters usually offer [IPO] shares to their most valued clients." SEC, *IPOs: Why Individuals Have Difficulty Getting Shares*, *supra*; see *Department of Enforcement* v. *Invemed Assocs.*, No. CAF-030014, at 12-13 (NASD Office of Hearing Officers Mar. 3, 2006) (appeal pending) (underwriters' "lawful discretion" and "industry-wide practice" for "30 years" includes allocating "IPO shares to broker-dealers' best customers measured by their aggregate commissions"); *Amendments to Regulation M: Anti-Manipulation Rules Concerning Securities Offerings*, Release No. 34-50831, 69 Fed. Reg. 75774, 75785 (Dec. 17, 2004) (securities laws do not "prohibit a firm from allocating IPO shares to a customer because the customer has separately retained the firm for other services" for which the customer has "not paid excessive compensation"). The practice of allocating IPO shares to good customers also facilitates the collection of information about a customer's aftermarket intention to hold or flip the stock and the level of demand for the security, which informs the pricing of the offering.

B. The Complaints Seek Treble Damages Based On Conduct Essential To The Success Of IPOs.

Plaintiffs have launched an "indiscriminate assault" on this system of capital formation, challenging conduct that the SEC believes is "necessary" to the success of firm commitment underwritings. Pet. App. 91a, 153a-154a. In their "theater-wide attack on the syndicate system" (*id.* at 86a), the Billing plaintiffs find evidence of unlawful conspiracy when underwriters "regularly combined" into and "communicated and worked together" as syndicates, made agreements to manage syndicates, hosted road shows, conducted "telephone

calls, meetings" and "regular communications" prior to IPOs, and "frequently communicated with one another as members" of stock exchanges and Self Regulatory Organizations ("SROs"), including the NASD and New York Stock Exchange ("NYSE"). Billing Am. Compl. ¶¶ 37-39, 45, 47, 54. These activities "are expressly permitted under the current securities regulatory regime." Pet. App. 92a; see *id.* at 154a-155a (the SEC confirms that this is all "permissible, regulated conduct"); U.S. Br. 12.

In the course of these joint activities, the Billing plaintiffs conclusorily assert, the underwriters conspired to require purchasers of IPO shares to pay "anticompetitive charges" in addition to the IPO price. Billing Am. Compl. ¶ 41. In exchange for receiving an IPO allocation, investors allegedly agreed to buy the security in the aftermarket at escalating prices (so-called "tie-in" or "laddering" arrangements), to buy the issuer's securities in subsequent offerings, or to buy other less attractive securities. *Id.* ¶ 42. This allegedly "inflate[d] the trading volume and prices of the [IPO] Securities by substantial amounts." *Id.* ¶ 8. In addition, plaintiffs claim that underwriters based allocations of IPO shares on the investor's willingness to funnel some profits from those shares to the allocating bank through payment of "non-competitively determined commissions" on purchases of unrelated securities. *Id.* ¶ 6. Plaintiffs who received IPO allocations at the issue price assert that they were injured by having to pay anticompetitive charges. Those who bought in the aftermarket say they were injured because they paid an artificially inflated market price. Billing Am. Compl. ¶¶ 6-8, 42-43, 60-61, 65, 72-73, 79; Pet. App. 17a-18a.

Based on these allegations—which defendants vigorously deny—the Billing plaintiffs seek treble damages under section 1 of the Sherman Act and state antitrust laws on behalf of a putative class of "tens of thousands" of investors who spent "many billions of dollars" on shares in 900 internet and technology companies. Plaintiffs assert that ten leading in-

vestment banks are responsible for losses that IPO and aftermarket buyers suffered in these highly speculative stocks when the "bubble" market of the late 1990s collapsed. Billing Am. Compl. ¶¶ 1, 10, 25, 27, 33.

The Pfeiffer complaint alleges that petitioners—eight of the investment banks sued in Billing along with eight of their institutional investor customers—violated the Robinson-Patman Act by engaging in "commercial bribery." Pfeiffer Compl. ¶ 6. Although the Pfeiffer suit uses a different legal label, the district court recognized that it turns on the "same conduct" that underlies the Billing plaintiffs' claims. Pet. App. 75a. Pfeiffer seeks treble damages on behalf of those who bought internet and technology stocks in IPOs or the aftermarket during the late 1990s; alleges that underwriters conditioned the allocation of shares on investors agreeing to buy additional shares in the aftermarket and to pay excessive commissions; and claims that analysts issued "buy" recommendations to drive up the price of the security in the aftermarket. Pfeiffer Compl. ¶¶ 1, 74-101, 115. As the SEC stated, "the fundamental point" of the Billing and Pfeiffer complaints "is the same." Pet. App. 128a n.1.

The conduct alleged in these two antitrust suits is the subject of more than 300 suits under the securities laws. *In re Initial Pub. Offering Sec. Litig.*, 241 F. Supp. 2d 281 (S.D.N.Y. 2003); *Miles* v. *Merrill Lynch & Co.*, 471 F.3d 24 (2d Cir. 2006). Exactly like the Billing and Pfeiffer suits, those securities actions—brought by many of the same plaintiffs' lawyers involved here—allege an industry-wide scheme characterized by tie-in agreements, payment of additional compensation to underwriters, and optimistic analyst reports. 241 F. Supp. 2d at 293-296. Unlike the Billing and Pfeiffer suits, the securities actions do not seek punitive treble damages, which are not permitted under the securities laws. 15 U.S.C. § 78bb; see also *id.* §§ 78u-4(e), 77k(e), (g).

C. Pursuant To Congressional Authority, The SEC And NASD Actively Regulate The Alleged Conduct.

1. The SEC Has Plenary Authority To Regulate IPOs.

The securities laws give the SEC "plenary authority" over the distribution of securities. Pet. App. 97a; see 3 Hunter Decl., Dist. Ct. Dkt. No. 99, Regulation Chart (describing dozens of applicable securities laws provisions). The Securities Act grants the SEC "power to regulate all aspects of the syndicate system," including "communications among underwriting participants and their customers prior to distribution," such as "roadshows, the dissemination of prospectuses, the process of book-building and solicitations of 'indications of interest.'" Pet. App. 97a, citing 15 U.S.C. §§ 77b(a)(3), 77j, 77l, 77z-2; U.S. Br. 12.

In addition, Congress in the Securities Exchange Act provided the SEC with "sweeping authority" to define manipulation and to decide when and how to prevent, restrict, or permit it. Pet. App. 99a; 15 U.S.C. § 78o(c)(2)(A), (D) (prohibiting underwriters from engaging in "fraudulent, deceptive, or manipulative" conduct and empowering the SEC to define that conduct). Section 9(a) authorizes the SEC to regulate transactions effected "for the purpose of pegging, fixing, or stabilizing the price of [a] security." *Id.* § 78i(a)(6). Section 10(b) confers broad authority to regulate "any manipulative or deceptive device or contrivance." *Id.* § 78j(b). The SEC's power extends to concerted conduct. *Id.* § 78i(a)(6) (the SEC may prohibit manipulative practices effected "with one or more other persons").

The SEC also has authority under the Exchange Act to oversee the entire "spectrum of broker-dealer conduct through its pervasive regulation of the NASD and other SROs." Pet. App. 104a. SRO rules go into effect only after the SEC finds them consistent with the requirements of the securities laws. 15 U.S.C. §§ 78o-3(b), 78s(b)(1)-(2). The NASD, as "the primary regulatory body for the broker-dealer

industry, * * * closely regulates the market activities" of the defendants, including the conduct of IPOs, "subject to the stringent oversight of the SEC." Br. of the NASD as Amicus Curiae in Support of Certiorari 1-2 ("NASD Br.").

Congress vested the SEC with broad discretion to implement this comprehensive regulatory scheme. It understood that "so delicate a mechanism as the modern stock exchange cannot be regulated efficiently under a rigid statutory program," and that "considerable latitude" must be "allowed for the exercise of administrative discretion" in order "to avoid, on the one hand, unworkable 'strait-jacket' regulation and, on the other, loopholes which may be penetrated by slight variations in the method of doing business." S. REP. NO. 73-792, at 5 (1934). Stated otherwise, "[i]n a field where practices constantly vary and where practices legitimate for some purposes may be turned to illegitimate and fraudulent means, broad discretionary powers in the [SEC] have been found practically essential." H.R. REP. NO. 73-1383, at 6-7 (1934).

2. The SEC And NASD Consider Competition Along With Other Factors In Regulating IPOs.

Congress directed the SEC and SROs to weigh the impact of proposed regulations on competition in the securities industry. But unlike the antitrust laws, the "sole aim" of which "is to protect competition" (*Gordon* v. *New York Stock Exch.*, 422 U.S. 659, 689 (1975)), the securities laws require the SEC and SROs also to weigh goals that are not always served by unconstrained competition, such as investor protection, market efficiency, and capital formation. See 15 U.S.C. § 78w(a)(2) (Exchange Act requires the SEC to "consider *among other matters* the impact any [proposed] rule or regulation would have on competition"); *id.* § 78o-3(b)(9) (SEC must ensure that rules promulgated by SROs "do not impose any burden on competition *not necessary or appropriate*") (emphases added); see also *id.* § 78f(b)(5). In 1996 amendments, Congress made explicit that when the SEC "is engaged in rulemaking and is required to consider or determine

whether an action is necessary or appropriate in the public interest, the Commission shall also consider, in addition to the protection of investors, whether the action will promote efficiency, competition, and capital formation." *Id.* § 77b(b); accord *id.* § 78c(f).

Congress rejected an earlier proposal by the Justice Department to import a "competition first" policy into the securities laws. In 1975, Congress considered requiring the SEC "to adopt the least anticompetitive means of protecting investors and preserving fair and orderly markets" when examining proposed SRO rules. Release No. 34-17371, 45 Fed. Reg. 83707, 83719 (Dec. 12, 1980). Congress in the Securities Acts Amendments of 1975, Pub. L. No. 94-29, 89 Stat. 97 (1975), disapproved that "rigid standard," setting forth instead the balancing tests currently found in the Act. 45 Fed. Reg. 83719. It concluded that the "obligation to balance * * * the competitive implications of self-regulatory and [SEC] action should not be viewed as requiring the [SEC] to justify that such actions be the least anti-competitive manner of achieving a regulatory objective." S. REP. NO. 94-75, at 13 (1975). Rather, the SEC must "weigh competitive impact in reaching regulatory conclusions." *Ibid.*

3. The SEC And NASD Have Exercised Their Authority To Regulate The Alleged Conduct.

a. The SEC and NASD regulate IPOs from start to finish.

Exercising the broad authority provided by Congress, the SEC and NASD regulate all aspects of IPOs. The SEC "expressly recognizes" the importance of syndicates, which are "comprehensively and actively regulate[d]" by the NASD, "including their formation, communications among syndicate members, commission structure, allocation of securities and fee arrangements." Pet. App. 87a-88a; see *id.* at 88a-89a & n.7 (describing numerous NASD rules and interpretations regulating syndicates). Among other things, the NASD has

preserved the "freedom" of underwriters to work together in underwriting "to the extent permitted by the federal securities laws" and has made clear that syndicate members may communicate with one another to "explor[e] the possibility of a purchase or sale of that security, and to negotiate for or agree to such purchase or sale." NASD Manual, IM-2110-5. Syndicate members' communications prior to distribution of an IPO, including communications with potential investors during the road show, are regulated directly by the SEC. Securities Act Rule 134, for example, governs the "building of the book" and permits underwriters to collect "indications of interest" from potential investors. 17 C.F.R. § 230.134.

"[U]nderwriter compensation and commission practices" are likewise subject to "active regulation." Pet. App. 105a-106a. As this Court found in *Gordon*, Congress intended in the Exchange Act to leave the supervision of commission rates to the SEC. 422 U.S. at 690-691. The SEC requires underwriters to disclose their "compensation and the amount of discounts and commissions to be paid to the underwriter" in connection with an IPO. 17 C.F.R. § 229.508(e); see *id.* §§ 230.461(a) & (b)(6), 240.10b-10(a)(2)(i)(B). The NASD, in turn, defines what constitutes underwriter compensation and limits the amount of compensation underwriters may receive from issuers. NASD Manual, Rule 2710. NASD rules also govern the fairness and disclosure of commissions that underwriters charge their customers and list factors that underwriters must consider in setting their compensation. See NASD Manual, IM-2440. The SEC and NASD "regularly enforc[e] violations of NASD rules concerning underwriter compensation and commissions." Pet. App. 106a n.23.

The SEC has adopted a host of regulations governing manipulative and deceptive conduct during and after public offerings. *E.g.*, 17 C.F.R. §§ 240.10b-1 to 240.10b-18; *id.* §§ 240.15c1-2 to 240.15c1-9; *id.* §§ 240.15c2-1 to 240.15c2-12. Regulation M makes it unlawful for IPO participants "to bid for, purchase, or attempt to induce any person to bid for

or purchase" the IPO security before the distribution is completed, subject to exceptions for transactions and solicitations necessary to the IPO. 17 C.F.R. §§ 242.101(a) & (b)(8)-(9). Regulation M also prohibits aftermarket "stabilization" of an IPO stock "except for the purpose of preventing or retarding a decline in the market price of the security." *Id.* § 242.104(a)-(b).

b. The SEC and NASD actively regulate the conduct alleged in the complaints.

The SEC has a "well-documented history of considering the very conduct alleged in this action." Pet. App. 110a. In 1963, the SEC sent Congress a report that identified problems arising from the "hot-issue phenomenon"—including the solicitation of aftermarket purchases and underwriter compensation arrangements. SPECIAL STUDY, Pt. 1, at 520-521. The SEC specifically addressed the pre-distribution solicitation of aftermarket purchases in 1974, when it issued Proposed Rule 10b-20. Release No. 34-10636, 39 Fed. Reg. 7806 (Feb. 11, 1974). That rule would have barred underwriters from demanding payment in addition to the IPO price, including "conditioning an allocation of shares in a 'hot issue' * * * on an agreement to buy shares in another offering or in the aftermarket." SEC Div. of Market Regulation, Staff Legal Bulletin No. 10: *Prohibited Solicitations and "Tie-in" Agreements for Aftermarket Purchases* ¶ 2 n.6 (Aug. 25, 2000). The SEC withdrew proposed Rule 10b-20. Release No. 34-26182, 53 Fed. Reg. 41206 (Oct. 20, 1988). The SEC informed the courts below that it "considered, but eventually rejected, imposing bright-line rules concerning 'tie-in' arrangements and other improper aftermarket practices," "favoring instead a flexible regulatory approach under its general anti-fraud provisions." Pet. App. 112a.

The SEC again considered these issues in a 1984 report finding that certain "tie-in arrangements" may violate the Exchange Act. REPORT OF THE SEC CONCERNING THE HOT ISSUES MARKETS 37-38 (Aug. 1984). Reflecting the delicate

balance that the SEC must achieve, the agency pointed out that it "maintained vigilant oversight over the hot issues markets" and had "aggressively ferreted out fraudulent conduct" while "avoiding unnecessary restrictions on first-time issuers that may stifle creativity, deny essential financing to legitimate businesses, and deter legitimate conduct." *Id.* at 81-82.

In 2000, the SEC staff addressed complaints that underwriters required customers "to buy additional shares in the aftermarket as a condition to being allocated [IPO] shares." Staff Legal Bulletin No. 10 ¶ 1. It concluded that "[t]ie-in agreements" are "prohibited by Regulation M" and "may violate the anti-manipulative provisions of the Exchange Act." *Id.* ¶ 2. In 2003, a blue-ribbon panel convened at the request of the SEC made recommendations to address allegations that underwriters allocated IPO shares based on investors' commitments to "purchase additional shares in the aftermarket" or to "pay excessive commissions on trades of unrelated securities." NYSE/NASD IPO ADVISORY COMMITTEE, REPORT AND RECOMMENDATIONS 1-2 (May 2003).

In 2005 guidance based upon this advisory committee report, the SEC made clear that whether a communication "constitutes legitimate book-building or an attempt to induce a bid or purchase in violation of Regulation M depends on the particular facts and circumstances." *Allocations Release*, *supra*, Pet. App. 225a. Observing that "obtaining and assessing information about demand for an offering during the book-building process" is not improper (*ibid.*), the SEC explained that underwriters may permissibly inquire about customers' "desired future position" in the IPO stock "in the longer term" and the "price or prices at which customers might accumulate that position," and that customers may express to underwriters their unsolicited "desire to purchase in the aftermarket." *Id.* at 227a-229a. However, underwriters may not solicit customers before completion of the IPO distribution "regarding whether and at what price and in what

quantity they intend to place immediate aftermarket orders." *Id.* at 227a.[1]

In addition to this ongoing regulatory activity, the SEC and NASD both filed enforcement actions, which were all settled without an admission or denial of liability, alleging that individual underwriters violated securities laws and NASD rules by "engaging in conduct very similar, if not identical, to that alleged" here. Pet. App. 117a-118a & n.28 (citing enforcement actions involving J.P. Morgan Securities, Robertson Stephens, and Credit Suisse First Boston); see also SEC Litig. Release No. 19051 (Jan. 25, 2005), *SEC* v. *Goldman Sachs & Co.* (S.D.N.Y.); SEC Litig. Release No. 19050 (Jan. 25, 2005), *SEC* v. *Morgan Stanley & Co.* (D.D.C.). In *J.P. Morgan*, for example, the SEC alleged that the bank violated Regulation M and NASD Rule 2110 by attempting to induce IPO allocants to buy additional shares in the after-

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[1] In response to the blue-ribbon panel's report, the NASD proposed to bar underwriters from soliciting customers to buy "shares in the aftermarket as a condition to being allocated shares in the IPO." NASD Notice to Members No. 02-55, at 525 (Aug. 2002); see NASD Notice to Members No. 03-72, at 771 (Nov. 2003). The NASD elected not to pursue that proposal given commentators' concerns about the chilling effect of the rule on legitimate inquiries and suggestions that heightened NASD supervision would be more effective than a rule change. The NASD did propose a rule change barring conditioning IPO allocations on the receipt of "compensation that is excessive in relation to the services provided," which is pending before the SEC. Letter from Marc Menchel (NASD) to Katherine England (SEC) Regarding Proposed Rule Governing Allocations and Distributions of Shares in Initial Public Offerings, amend. No. 2 (Aug. 4, 2004), available at http://www.nasd.com/web/groups/rules_regs/documents/rule_filing/nasdw_010729.pdf.

The NYSE similarly proposed rule changes in response to the panel report. See Release No. 34-50896, 69 Fed. Reg. 77804 (Dec. 20, 2004) (proposed NYSE Rule 470). The SEC is in the process of considering those proposals. See http://sec.gov/rules/sro/nysc/nyse200412.shtml (collecting comments).

market. The bank consented to a final judgment that required it to pay a $25 million civil penalty and enjoined it from violating Regulation M and Rule 2110. Pet. App. 118a n.28. In other enforcement actions, the SEC and NASD alleged that underwriters exacted excessive commissions that were "profit-sharing in exchange for IPO allocations." J.A. 82 ¶¶ 68-69; see SEC Litig. Release No. 17327 (Jan. 22, 2002), *SEC* v. *Credit Suisse* (D.D.C.); *Invemed Assocs.*, *supra* (rejecting NASD charges of excessive commissions and profit sharing). None of the enforcement actions alleged collusion between any banks.

D. The SEC Informed The Lower Courts That Immunity Is Necessary Here To Avoid Disrupting Congress's Securities Regulatory Scheme.

The SEC asked the courts below to dismiss plaintiffs' antitrust claims on the ground of implied immunity. The SEC explained that "immunity is necessary" because the practices alleged lie at "the very heart of [its] regulatory authority" and permitting these antitrust suits to proceed "would disrupt the Commission's regulatory regime, as established by Congress, including particularly its ongoing regulatory efforts." Pet. App. 127a-129a. Describing its statutory authority to regulate syndicated underwritings and oversight responsibility for the NASD, the SEC observed that Congress expects it—not antitrust juries—"to determine the appropriate role for competition in the securities industry." *Id.* at 127a-136a.

The SEC explained that the repugnancy necessary for implying immunity is present even if some of the conduct alleged by plaintiffs violates the securities laws. Regulation of the offering process involves "a continual adjustment of previous rules to newly emerging or identified problems, balancing and re-balancing relevant factors to protect investors and the public interest." Pet. App. 195a. Thus, what constitutes illegal conduct may change with "future developments in the offering process" or the SEC's evolving "understanding of the public interest and investor protection." *Id.* at 191a.

Moreover, the SEC "is actively pursuing comprehensive regulatory responses" to the allegations made in plaintiffs' complaints, including an "ongoing review" of its rules and active enforcement. *Id.* at 127a-128a, 137a-139a. The SEC concluded that allowing antitrust courts and juries to substitute their views for the SEC's expertise would disrupt these regulatory efforts. *Id.* at 128a-129a, 156a-157a. Indeed, in an area that inherently raises "clos[e] questions," the "*in terrorem* effect" of "potentially crippling treble damages awards" would make antitrust concerns "the predominant considerations in the underwriting process" and "[d]eter conduct that would serve the interests of the markets and the capital formation process." *Id.* at 193a-194a, 197a.

E. The District Court Agreed With The SEC And Dismissed Plaintiffs' Treble Damages Complaints.

Reviewing this Court's decisions in *Silver* v. *New York Stock Exch.*, 373 U.S. 341 (1963), *Gordon*, and *United States* v. *National Ass'n of Securities Dealers*, 422 U.S. 694 (1975), the district court discerned "two narrowly defined situations" in which the doctrine of implied immunity applies: "first, when an agency, acting pursuant to a specific Congressional directive, actively regulates the particular conduct challenged" (as in *Gordon*), or "second, when the regulatory scheme is so pervasive that Congress must be assumed to have foresworn the paradigm of competition" (as in *NASD*). Pet. App. 80a-81a (quotation marks omitted). In either circumstance, the district court emphasized, "only where there is a 'plain repugnancy between the antitrust and regulatory provisions' will repeal be implied." *Id.* at 81a (quoting *Gordon*, 422 U.S. at 682). The court agreed with the SEC that the regulatory framework governing IPOs is "pervasive," but ultimately decided that the conduct alleged is immune "under a *Gordon* analysis" because the SEC's "sweeping" and actively exercised power to regulate the challenged conduct creates a "potential conflict with the antitrust laws" and

thus the "plain repugnancy" that the immunity doctrine is designed to prevent. *Id.* at 86a, 93a.

The district court found that "much of the conduct alleged," such as the operation of syndicates, "is authorized." Pet. App. 86a. It concluded that a determination that conduct permitted by the SEC violates antitrust law would create a "direct conflict" with the securities laws and that "[t]his species of 'plain repugnancy'" would "'render nugatory the legislative provision for regulatory agency supervision.'" *Id.* at 93a. With respect to the purported "tie-in" agreements, the court held that Congress gave the SEC "broad power to regulate the conduct at issue" and that the SEC has a "well-documented history of considering the very conduct alleged in this action." *Id.* at 94a, 110a. As a result, "potential conflicts" and the necessary repugnancy "exist even between activities that are, at the current time, prohibited under both the securities and antitrust regulatory regimes." *Id.* at 94a. The court thus held that "a failure to find implied immunity would 'conflict with an overall regulatory scheme that empowers the [SEC] to allow conduct that the antitrust laws would prohibit.'" *Id.* at 119a.

F. The Second Circuit Rejected The SEC's Position And Reinstated Plaintiffs' Treble Damages Complaints.

In the only decision ever to reject the SEC's assertion that implied immunity is necessary, the Second Circuit vacated the district court's judgment. The court of appeals fashioned a fact-intensive, multi-prong test under which immunity may be implied only if "Congress contemplated the specific conflict and intended for the antitrust laws to be repealed." In applying this standard the court looked for "congressional intent" to repeal the antitrust laws with respect to the "specific" conduct at issue; agency power "to compel action prohibited by the antitrust laws"; evidence that applying the antitrust laws would "rob the SEC of some grant of discretion"; "a regulatory history" showing that the SEC once per-

mitted the challenged conduct; and "other evidence" that "the statute implies a repeal." Pet. App. 53a-57a.

The court of appeals acknowledged that the SEC had "unquestionable jurisdiction" over the challenged conduct, but held immunity unwarranted under its new, complex set of factors. Pet. App. 64a. It found "no legislative history indicating that Congress intended to immunize" the challenged conduct, no SEC power "to force underwriters to offer tie-in agreements," no provision of the securities laws that would be "mooted" by applying the antitrust laws, no history of the SEC authorizing "tying and laddering," and "no other indication of congressional intent to repeal the antitrust laws and immunize IPO tie-in agreements." *Id.* at 64a-67a. The court of appeals also held inapplicable what it termed the "vague" pervasive regulation basis for immunity, limiting *NASD*, which applied that immunity standard, to cases challenging the conduct of SROs. Pet. App. 49a, 68a.

The court suggested that the "flexibility" of the antitrust laws "lowers the stakes" of denying implied immunity because antitrust juries may "consider" the regulatory framework when applying "the rule of reason." It declined, however, to "expound on the extent" to which this purported flexibility "would here preclude or qualify antitrust liability in the absence of implied immunity." Pet. App. 58a-60a.

G. The United States Urges Reversal Of The Second Circuit's Decision.

The SEC and Antitrust Division of the Department of Justice took opposing positions in the courts below on the question whether immunity should be implied. In this Court, however, the United States filed a brief at the petition stage on behalf of both the SEC and Department of Justice urging reversal of the Second Circuit's decision, which would "undercut critical national regulatory policies and interfere with the capital formation process." U.S. Br. 4 n.2, 19.

The United States concluded that the Second Circuit erred in holding that plaintiffs' "generalized allegations of conduct prohibited under the regulatory scheme" barred immunity. U.S. Br. 8, 12. The United States advocated a standard under which the antitrust laws are impliedly repealed with respect to conduct "authorized" by the SEC and with respect to any "activities that are directly related to and cannot practically be separated from authorized conduct." *Id.* at 10-11 (citing *NASD*, 422 U.S. at 733-734). The plain repugnancy requirement is met in such instances because "[f]ailure to recognize immunity for activities that are inextricably intertwined with permissible collaborative conduct could effectively vitiate the immunity for the authorized conduct and thus conflict with the regulatory scheme." *Id.* at 11. According to the United States, the Second Circuit erred in failing to undertake a "fact-specific inquiry" to determine whether plaintiffs' tie-in and excessive commission allegations "impermissibly rest on the complaint's more specific assertions of legitimate and immune conduct." *Id.* at 15.

SUMMARY OF ARGUMENT

I. The district court correctly found that the principles set forth in *Gordon* v. *New York Stock Exch.*, 422 U.S. 659 (1975), and *United States* v. *National Ass'n of Securities Dealers*, 422 U.S. 694 (1975), require dismissal of both the Sherman Act and Robinson-Patman Act complaints on implied immunity grounds. The *Gordon* test is satisfied because the SEC indisputably has the power to regulate all of the conduct plaintiffs challenge and has actively exercised (and continues to exercise) that authority with respect to the alleged conduct at the heart of this litigation. Pet. App. 93a-119a. And, although the district court's decision did not rest on this basis, it rightly observed that *NASD*'s "pervasive regulation" test for immunity is also satisfied here because the SEC has extensive and comprehensive authority to regulate every aspect of the IPO distribution process. *Id.* at 86a.

The repugnancy required under *Gordon* and *NASD* is clear. Much of the conduct on which the conspiracy claim rests is expressly permitted and even encouraged by the SEC. Allowing application of the antitrust laws to this activity would "'render nugatory the legislative provision for [SEC] supervision'" and risk chilling conduct vital to the Nation's economy. Pet. App. 93a (quoting *Gordon*, 422 U.S. at 691).

The same conclusion applies to the alleged conduct that the SEC does not permit—excessive commissions and laddering. Given the SEC's power to determine what constitutes reasonable brokerage commission practices and to define the boundaries between permissible indications of interest and unlawful tie-in arrangements, as well as its ongoing efforts to refine its guidance in both those areas, maintaining an antitrust action challenging such activities "poses a substantial danger that [defendants] would be subjected to duplicative and inconsistent standards." *NASD*, 422 U.S. at 735. In making distinctions between permissible and unlawful conduct, securities regulators balance goals of competition, investor protection, and capital formation, as Congress intended—an analysis that no antitrust jury applying competition-first rules would replicate. As in *Verizon Communications* v. *Law Offices of Curtis V. Trinko*, 540 U.S. 398, 406 (2004), there is in these cases a "real possibility of [antitrust] judgments conflicting with the agency's regulatory scheme."

Trinko confirms that it is bad policy to permit antitrust litigation on top of a regulatory regime that is already designed to deter anticompetitive conduct and already offers a "variety of litigation routes" (which plaintiffs are pursuing in hundreds of securities actions aimed at the same conduct alleged here). It produces no benefits that outweigh the considerable harm to the securities regulatory scheme caused by the risk of treble damages awarded by lay antitrust juries, which will produce "false condemnations" that "chill" protected conduct and "distort investment" in a critical segment of the Nation's economy. 540 U.S. at 414. None of this Court's

precedents, which the Second Circuit seriously misinterpreted, is to the contrary.

II. United States capital markets are the envy of the world and have developed under a system of regulation that considers competition along with other goals, including capital formation. Permitting antitrust challenges to highly regulated underwriting practices—which necessarily involve collaborative conduct that readily lends itself to conspiracy claims—will displace Congress's scheme of expert regulation. Underwriters not only would have to conform their conduct to SEC and SRO rules, but also would have to avoid collaborative activities that arguably could subject them to the risk of enormous treble damages awards under a competition-first antitrust regime. Legitimate conduct that regulators recognize is important to capital formation, including desirable book-building and IPO allocation practices, would be deterred. And the regulatory scheme that has protected our capital markets would be thoroughly undermined, exacerbating a growing trend of securities offerings shifting overseas.

That result would be repugnant to the securities laws. In a suit brought under the securities laws challenging the conduct alleged here, plaintiffs would be limited to recovery of actual damages under Section 28 of the Securities Exchange Act. A host of additional safeguards imposed by this Court would apply, such as the rigorous proof of loss causation required in *Dura Pharm.* v. *Broudo*, 544 U.S. 336 (2005). Congress's reforms in the Private Securities Litigation Reform Act, designed to combat abuses that lead to extortionate settlements in securities suits, would impose heightened pleading standards, an automatic stay of discovery during dismissal proceedings, and procedural limits on the maintenance of class actions. To allow plaintiffs to evade all these safeguards by pleading their stock manipulation suit under the antitrust laws would foster the very litigation abuses that this Court has recognized and that Congress sought to counter.

III. It is no answer to say, as plaintiffs do, that the IPO conduct they allege should not be immune because some of it is unlawful under both the securities and antitrust laws. Immunity depends instead on a showing of active regulation of the conduct at issue or a pervasive regulatory scheme, coupled with a current or potential conflict between the antitrust and securities laws that threatens to disrupt the regulatory regime that Congress created. *Gordon*, 422 U.S. at 691; *NASD*, 422 U.S. at 733-734. This Court has found immunity in many cases over many years, although the conduct alleged may have violated the various regulatory schemes in question. *E.g.*, *Pan Am. World Airways* v. *United States*, 371 U.S. 296 (1963); *Brown* v. *Pro Football*, 518 U.S. 231 (1996).

Here, as the district court correctly determined when it applied this Court's established immunity standards, a clear actual conflict results from application of the antitrust laws to conduct the SEC permits and encourages. An equally clear potential conflict results from allowing an antitrust court to determine the boundaries of permissible and impermissible allocation and commission practices. Those boundaries—which the SEC is empowered to define and which are subject to continuous revision—depend on fact-intensive evaluations under SEC and NASD rules that draw nuanced distinctions that antitrust juries could not be counted on to apply. In addition, under the novel implied immunity test now proposed by the United States, the conduct alleged to be unlawful is "inextricably intertwined" with conduct the SEC permits, so that failure to recognize immunity for this conduct "could effectively vitiate the immunity for the authorized [activities] and thus conflict with the regulatory scheme." U.S. Br. 11.

Finally, there is no merit to the suggestion that the availability of an antitrust rule of reason analysis "lowers the stakes of any implied immunity evaluation" because the court may consider the relevant regulatory background. Pet. App. 60a. A rule of reason analysis requires a multi-step review of the procompetitive benefits and asserted justifications for the

challenged conduct, often entailing extensive litigation prior to the earliest possibility of a court determination of the conduct's lawfulness and substantial uncertainty about the outcome even when there has been no antitrust violation. *E.g.*, *Geneva Pharm. Tech. Corp.* v. *Barr Labs.*, 386 F.3d 485, 506-507 (2d Cir. 2004). Even if a rule of reason analysis could take into account the concerns of the securities regulatory regime—which given the line-drawing required in these cases is improbable—it would do little to alleviate the concerns of participants in the public offering process about potential exposure to antitrust litigation and liability. For that reason, this Court in *Silver* v. *New York Stock Exch.*, 373 U.S. 341 (1963), determined whether immunity should be implied *before* discussing the rule of reason. See also U.S. Br. 7-8 ("the court of appeals' decision fails to protect defendants against the prospect of having to defend against costly antitrust litigation based on conduct that the securities laws permit, and even encourage").

ARGUMENT

I. THIS COURT'S IMPLIED IMMUNITY PRECEDENTS REQUIRE DISMISSAL OF PLAINTIFFS' TREBLE DAMAGES ANTITRUST SUITS BECAUSE THEY ARE REPUGNANT TO THE SCHEME OF SECURITIES REGULATION.

The "detailed regulatory scheme" created by the Securities Act and the Securities Exchange Act "raises the question whether the regulated entities are not shielded from antitrust scrutiny altogether by the doctrine of implied immunity." *Verizon Communications* v. *Law Offices of Curtis V. Trinko*, 540 U.S. 398, 406 (2004). This Court defined the scope of implied immunity in the securities context in *Silver* v. *New York Stock Exch.*, 373 U.S. 341 (1963), *Gordon* v. *New York Stock Exch.*, 422 U.S. 659 (1975), and *United States* v. *National Ass'n of Securities Dealers*, 422 U.S. 694 (1975). Plaintiffs' suits squarely fit the criteria set forth in those deci-

sions, and the cost-benefit analysis this Court applied in *Trinko* confirms that immunity is necessary here.

A. *Silver*, *Gordon*, *NASD*, And *Trinko* Require Immunity For Conduct That The SEC Regulates Under A Standard That Balances Competition With Other Objectives.

In *Silver*, plaintiff brokers alleged that the New York Stock Exchange violated the antitrust laws by denying them wire connections with exchange member firms. That claim required this Court to reconcile the antitrust laws' condemnation of group boycotts with the Exchange Act, which "contemplat[es] that securities exchanges will engage in self-regulation which may well have anticompetitive effects." 373 U.S. at 349. The Court observed that although the Exchange Act obligates an exchange to formulate rules governing the conduct of its members, it did not—at that time—"give the [SEC] jurisdiction to review particular instances of enforcement of exchange rules." *Id.* at 357. Furthermore, this Court found "nothing built into the regulatory scheme which performs the antitrust function." *Id.* at 358. Given the lack of "conflict or coextensiveness of coverage [between] the agency's regulatory power" and the antitrust laws, the Court held that the suit could proceed. *Ibid.* It emphasized that "a different case" would be presented if "review of exchange self-regulation [was] provided through a vehicle other than the antitrust laws." *Id.* at 360.

That different case arose in *Gordon*, a private treble damages class action challenging the practice of fixing commission rates. After an extensive review of the legislative and regulatory history relating to commission rates in the securities industry, this Court determined that the challenged conduct was impliedly immune from antitrust scrutiny. In doing so, this Court rejected the Department of Justice's contention that immunity could be implied only where there is a "pervasive regulatory scheme," holding that immunity also applies where the SEC has been given specific regulatory authority

over the activity at issue and has exercised that authority. 422 U.S. at 688-689. Congress in section 19(b) of the Exchange Act had granted the SEC "direct regulatory power over exchange rules and practices with respect to 'the fixing of reasonable rates of commission,'" and the SEC subsequently "ha[d] taken an active role in review of proposed rate changes" based not on "a simplistic notion in favor of competition" but a broader policy analysis. *Id.* at 676, 685. In addition, even though at the time of the decision fixed exchange rates were prohibited under both the securities and antitrust laws, this Court noted that Congress had provided that the SEC "may allow reintroduction of fixed rates." *Id.* at 691.

Under those circumstances, this Court concluded that immunity must be implied because of the possibility that the SEC could modify the rules governing fixed rates in the future and thus subject the defendants to conflicting standards. 422 U.S. at 691. "[P]ermitting courts throughout the country to conduct their own antitrust proceedings would conflict with," and thus be repugnant to, "the regulatory scheme." *Id.* at 690. The potential for conflict was particularly high because "the sole aim of antitrust legislation is to protect competition," but the SEC also weighs "the economic health of the investors, the exchanges, and the securities industry." *Id.* at 689.

The same day it decided *Gordon*, this Court in *NASD* confirmed that antitrust immunity must be implied not only where the SEC actively exercises specific regulatory power over the challenged conduct, but also where the regulatory scheme the SEC has established is so pervasive that there is a real potential for conflict with the antitrust laws. In *NASD* the Department of Justice alleged a vertical conspiracy among underwriters and broker-dealers to restrict the sale and fix the price of mutual fund shares in the secondary market, as well as a horizontal conspiracy among NASD members to prevent the growth of that market. 422 U.S. at 701-702.

With respect to the vertical agreements, this Court held that they were immune because section 22(f) of the Investment Company Act gave the SEC the authority to promulgate rules and regulations prohibiting restrictions on the transferability of mutual fund shares. 422 U.S. at 722. Because of that specific regulatory power, the SEC's considered decision not to prohibit the challenged agreements, and the Commission's view that its authority would "be compromised seriously" if the agreements were "deemed actionable," this Court concluded that "the antitrust laws must give way if the regulatory scheme * * * is to work." *Id.* at 729-730. The requisite repugnancy was established because "[t]here can be no reconciliation of [the SEC's] authority under § 22(f) to permit these * * * agreements with the Sherman Act's declaration that they are illegal per se." *Id.* at 729.

As for the government's allegation of a horizontal conspiracy among NASD members to prevent development of a secondary dealer market, this Court determined that "the Sherman Act ha[d] been displaced by [a] pervasive regulatory scheme." 422 U.S. at 735. This Court held that "maintenance of an antitrust action for activities so directly related to the SEC's responsibilities" was repugnant to that scheme because it "pose[d] a substantial danger that [defendants] would be subjected to duplicative and inconsistent standards." *Ibid.* Immunity was necessary "to assure that the federal agency entrusted with regulation in the public interest could carry out that responsibility free from the disruption of conflicting judgments that might be voiced by courts exercising jurisdiction under the antitrust laws." *Id.* at 734.

Trinko confirmed that under *Gordon* and *NASD* immunity is necessary when there is "the real possibility of [antitrust] judgments conflicting with the agency's regulatory scheme." 540 U.S. at 406. Although immunity was ruled out in *Trinko* by an antitrust savings clause in the Telecommunications Act, this Court endorsed a cost-benefit calculus that provides important guidance here. *Id.* at 412.

Trinko explained that when "a regulatory structure designed to deter and remedy anticompetitive harm," such as the securities laws, is in place, "the additional benefit to competition provided by antitrust enforcement" is "small." 540 U.S. at 412. In contrast, the costs of antitrust intervention are substantial. Allowing antitrust scrutiny would impose a "layer of interminable litigation, atop the variety of litigation routes already" pursued by plaintiffs. *Id.* at 414; see *Merrill Lynch* v. *Dabit*, 126 S. Ct. 1503, 1514 (2006) ("parallel class actions" under distinct legal standards are "wasteful" and "duplicative"). And the "[m]istaken inferences" and "false condemnations" that result from jury trials on regulatory issues under the antitrust laws would "chill" protected conduct and "distort investment" as businesses seek to avoid treble damages awards. *Trinko*, 540 U.S. at 414. All of these dangers are present here.

B. Defendants' Alleged Conduct Is Immune From Antitrust Scrutiny Under These Precedents.

This Court's decisions establish that defendants are entitled to implied immunity from both the Sherman Act and Robinson-Patman Act claims. There is no dispute that the SEC has direct, comprehensive authority to regulate all of the conduct challenged in the complaints and that it has actively exercised (and continues to exercise) that authority. It is likewise clear, as the SEC and NASD have confirmed, that allowing these antitrust challenges to proceed would interfere with their regulatory authority and ongoing rulemaking and enforcement efforts and disrupt the capital-raising process that scheme is designed to promote and govern. Pet. App. 127a-129a, 193a-197a; NASD Br. 9, 11. In light of this plain repugnancy and the fact that a primary (though not the exclusive) function of the securities regulatory structure is to "deter and remedy anticompetitive harm" (*Trinko*, 540 U.S. at 412), the antitrust laws must give way to enable the scheme to work as Congress intended. *NASD*, 422 U.S. at 729-730.

1. Congress gave the SEC authority to regulate the offering process, oversee the NASD's rules governing syndicates, and permit or prohibit manipulative acts in the purchase and sale of securities. Pet. App. 97a, 132a-136a; *supra*, pp. 8-15. The conduct plaintiffs allege is "among the kinds of [practices] Congress contemplated when it enacted" the securities laws. *NASD*, 422 U.S. at 721. Indeed, it falls, the SEC has said, "within the very heart of [the agency's] regulatory authority" (Pet. App. 127a), which Congress understood had to be broad and flexible. S. REP. NO. 73-792, at 5, H.R. REP. NO. 73-1383, at 6-7 (1934); see 3 Hunter Decl., Dist. Ct. Dkt. No. 99, Regulation Chart; *supra*, p. 9.

In particular, Congress authorized the SEC to regulate commission rates, permit certain price discrimination among customers, and oversee NASD rules pertaining to underwriter compensation. 15 U.S.C. §§ 78f(e), 78o-3(b)(6), 78s(b), (c); NASD Manual, Rule 2710; Pet. App. 105a-106a. Congress committed to SEC regulation every aspect of the public offering process, including book-building and the conduct of the road show. Pet. App. 97a; *supra*, pp. 10-12. And 15 U.S.C. § 78i(a)(6) authorizes some forms of "price manipulation" (Pet. App. 9a), permitting transactions "for the purpose of pegging, fixing, or stabilizing" stock prices provided they do not contravene SEC rules and regulations.[2]

There is no question that in exercising its authority the SEC performs the antitrust function. Congress required the SEC to consider "the impact any * * * rule or regulation

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[2] 15 U.S.C. § 78i(a)(6) is similar to the statute construed in *NASD*, 15 U.S.C. § 80a-22(f), which "vested in the SEC final authority to determine whether and to what extent [such transactions] should be tolerated." 422 U.S. at 729. See also 15 U.S.C. § 78j(b) (permitting the use of "any manipulative or deceptive device or contrivance" that does not violate SEC rules); *id.* §§ 78i(a)(2), 78o(c)(2)(D), 78w(a)(1) (empowering the SEC to define prohibited trading intended to raise or depress prices, as well as fraudulent, deceptive, or manipulative acts).

would have on competition." 15 U.S.C. § 78w(a)(2); see *id.* § 78o-3(b)(9). But Congress also charged the SEC to consider the protection of investors, the promotion of efficiency and capital formation, and the public interest. *Id.* §§ 77b(b), 78c(f), 78i(a)(6). Congress refused to require it to "adopt the least anticompetitive means of protecting investors and preserving fair and orderly markets." Release No. 34-17371, 45 Fed. Reg. 83707, 83719 (Dec. 19, 1980); *supra*, p. 10.

Allowing plaintiffs' treble damages suits to proceed would "render nugatory" the SEC's authority to supervise defendants' alleged conduct and determine whether and to what extent it should be permitted. *Gordon*, 422 U.S. at 691. Without immunity, the SEC explained, underwriter conduct during a syndicated IPO would be scrutinized by a lay jury under competition-first antitrust principles that do "not take into account the sensitive countervailing considerations that the securities laws, and the Commission's expert administration, are charged with weighing in the balance." Pet. App. 196a. As in *Gordon*, conflicting antitrust and SEC regulatory standards are the predictable result. 422 U.S. at 689. And the risk of treble damages ensures that antitrust standards will prevail. See Hale & Hale, *Competition or Control VI: Application of Antitrust Laws to Regulated Industries*, 111 U. PA. L. REV. 46, 54-55 (1962-1963) ("Courts have readily perceived that recovery of treble damages by private litigants could easily disrupt regulatory patterns. * * * The treble damages example is an obvious case of 'repugnancy'").

2. These dangers are acute because the SEC in fact regulates the very conduct alleged by plaintiffs. See *Gordon*, 422 U.S. at 685. Plaintiffs do not dispute that joint syndicate activities are "pervasively regulated and approved by the Commission." Pet. App. 153a-154a; see *id.* at 86a-93a. With respect to plaintiffs' allegations of laddering and inflated commissions, the SEC has engaged in expert line-drawing of the type that implied immunity is designed to accommodate. See *infra*, pp. 13-15. For decades, the SEC has vigilantly su-

pervised public offering practices in "hot" markets, including "tie-in arrangements, and manipulation of the aftermarket." HOT ISSUES MARKETS REPORT, *supra*, at 28, 37-40; see SPECIAL STUDY OF SECURITIES MARKETS, *supra*, at 487-488, 514-559; *supra*, pp. 12-13. Its Regulation M prohibits quid pro quo agreements and aftermarket stabilization except to prevent or retard a decline in price. Pet. App. 102a-104a; 17 C.F.R. §§ 242.101 & .104. Its 2005 guidance draws fine lines between legitimate allocation practices that facilitate capital formation and manipulation that violates Regulation M, recognizing that the distinction between the two "depends on the particular facts and circumstances." *Allocations Release*, Pet. App. 225a; *infra*, pp. 45-46.

With respect to commissions, the SEC requires underwriters to disclose their compensation and commissions (17 C.F.R. § 229.508(e)) and monitors NASD rules that define and limit that compensation. Pet. App. 106a-107a. The SEC has drawn careful, fact-intensive distinctions between permitted and prohibited conduct in this area as well. For example, while excessive commission payments can violate the securities laws, customers are permitted to consider in paying brokerage commissions whether the broker allocated IPO shares to the customer and the overall services provided by the broker. Release No. 34-23170, 51 Fed. Reg. 16004, 16011 (Apr. 30, 1986); see also *Invemed Assocs.*, *supra* (it is not unlawful for customers voluntarily to increase order flow and commissions to increase their chances of obtaining IPO allocations). SEC rules also allow an underwriter to "allocat[e] IPO shares to a customer because the customer has separately retained the firm for other services" for which "the customer has not paid excessive compensation." Release No. 34-50831, 69 Fed. Reg. at 75785.

The potential disruption of the regulatory regime from an overlay of antitrust litigation is all the greater because the lines drawn by the SEC are not static. See *Gordon*, 422 U.S.

at 689-691.[3] As the SEC informed the Second Circuit, its regulation of the offering process involves "continual adjustment of previous rules to newly emerging or identified problems"—a dynamic regulatory response, supported by the notice and comment rulemaking process, which is incompatible with applying the antitrust laws to the same conduct. Pet. App. 195a. This adjustment requires "balancing and rebalancing relevant factors to protect investors and the public interest," including weighing "anti-competitive effects" against "countervailing benefits" in a context where the syndicate underwriting system "inherently" raises "substantial antitrust concern." *Id.* at 191a-192a, 195a. Because single-focus antitrust laws lack this administrative flexibility, "the antitrust laws must give way." *NASD*, 422 U.S. at 729.

The SEC and NASD have power to enforce their rules (*Silver*, 373 U.S. at 357) and have done so with respect to the conduct alleged here. They investigated IPO allocation practices following the market bubble and filed and settled actions against several investment banks, alleging that the bank engaged in one or more of the practices challenged here in violation of Regulation M or NASD Conduct Rule 2110. Pet. App. 137a-138a; *supra*, pp. 14-15. The SEC also established an expert panel to make recommendations in light of allegations of tie-ins, and the SEC, NASD, and NYSE proposed rule changes following the panel's report. *Supra*, pp. 13-14 & n.1. As surely as in *Gordon*, "[i]nterposition of the antitrust laws * * * in the face of [all this] positive SEC action" would "prevent the operation of the [securities laws] as intended by Congress." 422 U.S. at 691. See AREEDA & HOVENKAMP, ANTITRUST LAW ¶ 243a, at 77 (Supp. 2006) ("When the regulatory agency actually has jurisdiction over the chal-

[3] The SEC's authority to alter the boundaries between permissible and unlawful conduct comes not only from statutes previously discussed (at 28 & n.2), but also from the SEC's broad discretion to grant exemptions "even with respect to statutory prohibitions and requirements." Pet. App. 149a; see 15 U.S.C. §§ 77z-3, 78mm.

lenged practice and is actively taking [factors such as the vitality of the markets and economic health of regulated firms] into account, while not ignoring the impact on competition, then antitrust's own, much more myopic approach can frustrate regulatory goals").

3. In addition to meeting *Gordon*'s active regulation test, the conduct challenged here is immune from antitrust scrutiny because it is pervasively regulated by the SEC. *NASD*, 422 U.S. at 730 ("the SEC's exercise of regulatory authority" is "sufficiently pervasive to confer an implied immunity"). As the district court explained, "[t]he Securities Act provides the SEC with plenary authority to regulate [IPOs]," including the power to require registration of securities, regulate communications among underwriting participants and customers, and exercise "pervasive" oversight over the NASD's "comprehensiv[e] and activ[e] regulat[ion of] syndicates." Pet. App. 87a-88a, 97a. The Exchange Act grants the SEC "sweeping" authority to "define manipulative practices" in connection with IPOs and adopt rules to permit or proscribe such conduct. *Id.* at 99a, 134a; *supra* p. 8. It also authorizes the SEC to regulate underwriter commissions directly and by exercising "pervasive supervisory authority" over the NASD's rules. *NASD*, 422 U.S. at 733; Pet. App. 105a-107a.

Defendants do not argue, as plaintiffs and the United States have suggested, that the mere fact of general SEC jurisdiction over IPO allocation practices provides the basis for some "blanket" implied immunity from the antitrust laws. U.S. Br. 16.[4] To the contrary, as this Court made clear in both *Gordon*, 422 U.S. at 689, and *NASD*, it is the comprehensive and pervasive nature of the Commission's authority that creates the necessary repugnancy and requires the con-

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[4] The United States appears now to question whether "pervasive regulation" may provide a basis for implying immunity. U.S. Br. 15-16. That is contrary to its position in *Gordon*, see 422 U.S. at 688, and to the plain language of *Gordon*, *NASD*, and *Trinko*.

clusion "that Congress intended to lift the ban of the Sherman Act" from these activities. 422 U.S. at 733; see also *Trinko*, 540 U.S. at 406 ("a detailed regulatory scheme * * * ordinarily raises the question whether the regulated entities are not shielded from antitrust scrutiny altogether by the doctrine of implied immunity"). Under such circumstances permitting interposition of the antitrust laws "poses a substantial danger" of disrupting the regulatory scheme Congress created and subjecting industry participants to "duplicative and inconsistent standards." *NASD*, 422 U.S. at 734-735.

4. The cost-benefit analysis described in *Trinko* reinforces the conclusion that implied antitrust immunity is necessary. The securities "regulatory structure" is "designed to deter and remedy anticompetitive harm." 540 U.S. at 412. The SEC weighs competition (among other goals) in exercising its authority, issues rules such as Regulation M to deter anticompetitive conduct, and remedies such conduct through vigorous enforcement. See *Silver*, 373 U.S. at 360 (noting the importance to immunity analysis of the fact that review of the competitive impact of challenged conduct is "provided through a vehicle other than the antitrust laws"). Moreover, because the securities laws provide a private damages remedy that is "already available to and [is being] actively pursued by" many of these same plaintiffs' counsel, antitrust would provide little, if any, additional benefit to competition. *Trinko*, 540 U.S. at 412, 414.[5]

In contrast, the potential costs of permitting treble damages antitrust suits are enormous. The SEC's carefully drawn distinctions between permitted and prohibited IPO practices are not motivated solely by antitrust concerns, making them "difficult for antitrust [juries] to evaluate" and guaranteeing

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[5] Immunity was not implied in *Trinko* because the Telecommunications Act contained an express antitrust savings clause. Neither 15 U.S.C. § 77p(a) nor § 78bb(a) is an antitrust savings clause, and neither provision was found to bar immunity in *Gordon* or *NASD*.

"false condemnations." *Trinko*, 540 U.S. at 414. No underwriter could risk relying on distinctions drawn by the SEC that could be overridden by a lay antitrust jury wielding a treble damages class action penalty. That is why the SEC says that such condemnations threaten to chill protected conduct "in ways that are harmful to the overall securities markets," including conduct that, in the SEC's expert judgment, is "necessary to conduct syndicated underwriting." Pet. App. 153a, 197a. Under the *Trinko* analysis, the conjectural benefits of private antitrust suits in this context are not worth their costly disadvantages.

C. The Cases Outside The Securities Industry On Which Plaintiffs Rely Do Not Defeat Immunity.

Plaintiffs seek to avoid immunity by invoking *National Gerimedical Hosp.* v. *Blue Cross*, 452 U.S. 378 (1981), *Otter Tail Power Co.* v. *United States*, 410 U.S. 366 (1973), and *United States* v. *Philadelphia Nat'l Bank*, 374 U.S. 321 (1963). The specific immunity analyses in those cases are of little relevance because they involved vastly different regulatory schemes. See *Trinko*, 540 U.S. at 411-412 (emphasizing the importance of considering the regulatory structure "of the industry at issue"); *Phonetele, Inc.* v. *AT&T*, 664 F.2d 716, 727 (9th Cir. 1981) (Kennedy, J.) ("each of the Supreme Court's [implied immunity] cases is decisively shaped by considerations of the special aspects of the regulated industry involved").

In *Philadelphia Nat'l Bank* "there was an absence of continuing [regulatory] oversight" and hence a "lack of conflict" between regulatory and antitrust standards. *Gordon*, 422 U.S. at 689 n.14. In *Otter Tail* legislative history showed that Congress "rejected a pervasive regulatory scheme" in favor of "voluntary commercial relationships" and granted the Federal Power Commission only "limited authority" over the conduct at issue. 410 U.S. at 374. *National Gerimedical* presented a still "weaker" claim of immunity, involving a "spontaneous response to the finding of [a private] advisory

planning body" rendered when "the regulatory aspects of the [law] were not in place." 452 U.S. at 389-390.

Together these cases stand for the unremarkable proposition that limited regulatory authority does not require immunity where the legislative record demonstrates that Congress intended antitrust review to continue unimpeded. *Otter Tail*, 410 U.S. at 373-375 (describing Congress's "overriding policy of maintaining competition to the maximum extent possible"); *Philadelphia Nat'l Bank*, 374 U.S. at 352 (legislative history stated that the Bank Merger Act "would not affect in any way the applicability of the antitrust laws"); see *Gordon*, 422 U.S. at 689 n.14. These decisions recognize that immunity is warranted where, as here, there is no indication of congressional intent to leave the antitrust laws in place and implied repeal of those laws is "necessary" to the exercise of regulators' "authorized powers." *National Gerimedical*, 452 U.S. at 393 n.18. The SEC and SROs have authorized defendants' joint activities, engaged in regulatory line-drawing permitting some allocation and commission practices while prohibiting others, and may change their rules concerning those practices in the future. See U.S. Br. 12, 15. Under those circumstances, immunity is necessary to make the securities regulatory scheme work as Congress intended. See *National Gerimedical*, 452 U.S. at 389; *Philadelphia Nat'l Bank*, 374 U.S. at 352.

D. The Second Circuit's Freewheeling, Multi-Factor Test Is Contrary To This Court's Precedents.

In denying immunity the Second Circuit misperceived this Court's precedents. It held immunity exists only if Congress expressed an "intent to repeal the antitrust laws" either in so many words or by other clear evidence, or if there is a specific inconsistency, such as where the SEC compels the challenged activity, the antitrust laws would "moot" a provision of the securities laws, or the SEC has permitted the challenged conduct. Those miscellaneous criteria find no support in this Court's opinions.

Requiring an overt statement of legislative intent "with regard to [the] specific * * * conduct" (Pet. App. 53a) requires that Congress contemplated the specific conduct at issue and, if it did not, allows antitrust to override regulation. That is contrary to the fundamental purpose of regulation, which leaves matters not specifically foreseen by Congress to the expert agency. Implied immunity must enable a court to protect a regulatory scheme when "Congress is silent on the proper accommodation between regulation and antitrust." 1A AREEDA & HOVENKAMP ¶ 243d, at 319 (3d ed. 2006); see *Gordon,* 422 U.S. at 691. Requiring an explicit congressional statement would render implied immunity superfluous.

This Court has never limited immunity to cases where an agency may compel the challenged conduct. See *National Gerimedical*, 452 U.S. at 389 (immunity arises where agency may "authorize or require" conduct); 1A AREEDA & HOVENKAMP ¶ 243a2, at 314, ¶ 243e3, at 329 (the touchstone for immunity is an agency's "power to control" conduct and actual exercise of that power). This Court also has not limited immunity to situations where a specific "provision, sentence, phrase, or word" of the statute would be mooted by application of antitrust. Pet. App. 65a; see *NASD*, 422 U.S. at 730; 1A AREEDA & HOVENKAMP ¶ 243d, at 325 (*NASD* "invoke[d] the broad dangers of collision between antitrust and regulatory regimes rather than a narrow assessment of the challenged conduct itself"). To be sure, agency approval of conduct can suffice to establish the requisite conflict with the antitrust laws, but "[e]ven if the agency has not approved certain conduct but is aware of it and has acquiesced or has it under review, the same conflicts can arise." *Id.* ¶ 243g1, at 360; see *Gordon*, 422 U.S. at 691; *Trinko*, 540 U.S. at 412; U.S. Br. 11 (conduct inextricably intertwined with approved activity is immune). The Second Circuit's test offers regulated businesses and lower courts no useful direction. Instead, it will force participants in public offerings to avoid any conduct that an antitrust court might later construe as anticom-

petitive, thereby impeding, and potentially crippling, the book-building process.

II. IMPLIED IMMUNITY IS NECESSARY TO PREVENT HARM TO U.S. SECURITIES MARKETS AND TO IMPLEMENT CONGRESS'S INTENT.

A. Substituting Competition Rules Interpreted By Antitrust Juries For Expert SEC And NASD Regulation Of Public Offerings Would Seriously Threaten U.S. Capital Markets.

The plain repugnancy requirement for implied immunity is met here not only because of the threatened interference with the SEC's authority over the challenged conduct, but also because of the serious disruption of the Nation's capital markets that would result from allowing these cases to proceed. As the United States has explained, it is "of paramount importance that the capital formation process in this country not be undermined by the threat of treble damages liability" for conduct regulated by the SEC. The Second Circuit's denial of immunity plainly "fails to give adequate protection against that threat." U.S. Br. 9. Without immunity, collaborative underwriter conduct during a syndicated offering subject to detailed SEC regulation could nonetheless be deemed unreasonable by an antitrust court and punished with treble damages payable to a sprawling class of investors.

United States capital markets have flourished under SEC and SRO supervision. But as the SEC has warned, "the fear of potentially crippling treble damages awards" likely would "deter conduct that would serve the interests of the markets and the capital formation process." Pet. App. 194a; see U.S. Br. 9 ("permitting misdirected antitrust class actions to proceed could chill legitimate activity in our Nation's vitally important financial markets"); *Texas Indus.* v. *Radcliff Materials*, 451 U.S. 630, 636-637 (1981); see also Schumer & Bloomberg, *To Save New York, Learn From London*, WALL ST. J., Nov. 1, 2006, at A18 (observing that litigation risks in

the U.S. have contributed to a substantial recent exodus of capital raising activities to foreign markets).

Absent immunity, the SEC's balancing of the needs of investor protection, competition, and capital formation would be "displaced," and "antitrust concerns will become the predominant considerations in the underwriting process." Pet. App. 194a. That shift would "frustrate the [SEC's] role in applying its expertise to business conduct," to the profound detriment of markets in which syndicate underwriting is the principal method of raising business capital. Hovenkamp, *Antitrust Violations in Securities Markets*, 28 J. CORP. L. 607, 632-633 (2003). The NASD likewise predicts that without immunity in these cases, "pervasive litigation" and "crippling regulatory confusion" will impair its ability to regulate "in a manner that promotes market stability and capital formation" to the detriment of "the investments of millions of Americans." NASD Br. 2, 9.

B. Permitting Securities Litigation Dressed Up In Antitrust Clothing Would Allow An End Run Around Restrictions On Private Securities Class Actions.

To permit these thinly disguised securities cases to proceed as antitrust suits would endorse an end run around every rule of pleading, proof, damages, and procedure that Congress and this Court have deemed important in private securities actions. The result would heavily burden the federal courts as plaintiffs file more and more antitrust claims, lured by treble damages and attorneys' fees awards that are not available under the securities laws and that ratchet up the pressure on defendants to submit to extortionate settlements. See KENNETH ELZINGA & WILLIAM BREIT, THE ANTITRUST PENALTIES 90-95 (1976) (the treble damages remedy can encourage strike suits); Hylton, *When Should a Case be Dismissed?* 14-15 (AEI-Brookings Jt. Center for Reg. Studies, Apr. 2006) (huge defense costs and the risk of losing at trial can turn treble damages suits into legalized blackmail); RICHARD POSNER, ANTITRUST LAW 275 (2d ed. 2001).

Congress in Section 28 of the Exchange Act made the judgment that single damages are the correct measure of damages in cases alleging "manipulative and deceptive practices" in public securities markets. 15 U.S.C. § 78bb. The Act was not intended to permit "a vengeful striking back at brokers for [investors'] losses" or huge damages awards that "destroy stock markets and business." H.R. REP. NO. 73-1383, at 3 (1934); see S. REP. NO. 73-792, at 6, 13 (1934); *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723, 734 (1975). More recently, in removing securities fraud as a predicate offense in civil RICO actions, 18 U.S.C. § 1964(c), Congress concluded that it is unnecessary and "unfair to expose defendants in securities cases to the threat of treble damages" because the securities laws "provide adequate remedies for those injured by securities fraud." H.R. CONF. REP. NO. 104-369, at 47 (1995). In limiting awards to single damages Congress understood that modern securities markets in which huge liabilities can quickly accrue are different from other forms of commerce, and that liabilities in the "indeterminate amount" produced by punitive levels of damages would create an "extreme" hazard for the industry and markets. *Blue Chip Stamps*, 421 U.S. at 748, quoting *Ultramares Corp.* v. *Touche, Niven & Co.*, 255 N.Y. 170 (1931). Congress's damages limit on securities actions is properly one aspect of the "repugnance" analysis in suits like these that at bottom allege violations of the securities laws.

If the securities law issues underlying plaintiffs' antitrust suits were litigated in a securities case, they would be adjudicated under a host of additional safeguards that plaintiffs seek to bypass. This Court has imposed limitations on private securities fraud actions because they present "a danger of vexatiousness different in degree and in kind from that which accompanies litigation in general." *Blue Chip Stamps*, 421 U.S. at 739-740. It has interpreted the securities laws to require proof of loss causation (*Dura*, 544 U.S. at 341-346) and proof of scienter rather than mere negligence (*Ernst & Ernst* v. *Hochfelder*, 425 U.S. 185 (1976)), rejected a lax definition

of materiality (*TSC Indus.* v. *Northway, Inc.*, 426 U.S. 438 (1976)), limited the definition of actionable manipulation (*Santa Fe Indus.* v. *Green*, 430 U.S. 462 (1977)), and barred aiding and abetting claims. *Central Bank* v. *First Interstate Bank*, 511 U.S. 164, 188-190 (1994). Plaintiffs seek to vault over all these safeguards simply by re-labeling their securities claims as antitrust claims.

Congress has also imposed constraints designed to curb "abuses of the class-action vehicle in litigation involving nationally traded securities," including the extraction of "extortionate settlements." *Dabit*, 126 S. Ct. at 1510-1511. The PSLRA requires specific pleading of securities fraud, limits the maintenance of class actions, and withholds discovery pending resolution of dismissal issues. 15 U.S.C. §§ 78u-4(b)(1), (2) (requiring particularized pleading), § 78u-4(a) (special procedural requirements for class actions), §§ 78u-4(b)(3), 77z-1(b) (discovery stay). And because joint and several liability coerces innocent parties to settle rather than risk liability for a disproportionate share of the damages, the PSLRA mandates proportionate liability where the defendant did not knowingly violate the securities laws. *Id.* § 78u-4(f). *Cf. Texas Indus.*, 451 U.S. at 640, 646 (liability under the antitrust laws is joint and several and contribution is generally unavailable).

When securities plaintiffs tried to avoid the PSLRA's obstacles by filing state-law class actions in state court, Congress closed that loophole by enacting the Securities Litigation Uniform Standards Act (SLUSA), which barred certain state-law class actions alleging fraud "in connection with the purchase or sale of a covered security." 15 U.S.C. § 78bb(f)(1); *Dabit*, 126 S. Ct. at 1511. When plaintiffs responded by filing state-law securities claims alleging that investors were fraudulently induced to hold—not purchase or sell—securities, this Court rejected that gambit, because a "narrow reading" of SLUSA that did not cover holder suits

"would undercut the effectiveness of the [PSLRA]," contrary to Congress's clear purposes. *Id.* at 1513.

"If securities claims can simply be restructured as antitrust claims," Congress's intent in the PSLRA and SLUSA "to block abusive suits will once again be thwarted." SEC Commissioner Paul Atkins, *Remarks Before the Federalist Society* 4 (Sept. 21, 2006). "[V]irtually any practice, including fraud, deception, and misrepresentation, can be pled as an antitrust violation." AREEDA & HOVENKAMP ¶ 243a, at 76-77 (Supp. 2006). The need to prevent such evasions of protections Congress has enacted reinforces the importance of implying immunity in these cases.

III. PLAINTIFFS' ARGUMENTS AGAINST IMPLIED IMMUNITY ARE WITHOUT MERIT.

We have shown that this Court's decisions mandate implied immunity from these sprawling antitrust suits and that immunity is essential to protect the securities regulatory scheme established by Congress. The reasons plaintiffs offer for denying immunity are meritless.

A. Plaintiffs' Contention That Immunity May Not Be Implied Because The Conduct Alleged Is Unlawful Under Both The Securities And The Antitrust Laws Is Legally Erroneous.

Ignoring the fact that plaintiffs' only specific allegations concerning purportedly unlawful agreements describe conduct that is permitted under the securities laws (*e.g.*, Billing Am. Compl. ¶¶ 36-39, 44-62), plaintiffs contend that immunity cannot be implied because the complaints also contain conclusory allegations of tie-in and commission arrangements that might violate the securities laws. See U.S. Br. 14 (plaintiffs' "allegations of forbidden tie-in and laddering agreements are largely confined to * * * conclusory assertions"); Billing Am. Compl. ¶¶ 1, 4, 6-8, 41-42, 70-74. This Court's precedents do not support plaintiffs' contention, and the inquiry an antitrust jury would conduct into the legality

of defendants' conduct would itself seriously undermine the securities regulatory regime.

1. This Court's precedents show that allegations of conduct prohibited by the securities laws are no bar to implied immunity.

Plaintiffs misapprehend the implied immunity doctrine, which is based on the potential for conflict or repugnance between a regulatory scheme and the antitrust laws, not on the legality under the securities laws of every activity alleged in the complaint. See *Trinko*, 540 U.S. at 406 ("a detailed regulatory *scheme* * * * ordinarily raises the question whether the regulated entities are not shielded from antitrust scrutiny"); *NASD*, 422 U.S. at 719 (immunity turns on a showing of "repugnancy between the antitrust laws and the regulatory *system*"); *Gordon*, 422 U.S. at 690 (permitting courts "to conduct their own antitrust proceedings would conflict with the regulatory *scheme* authorized by Congress") (emphases added). As the SEC has demonstrated, and the United States confirms, whether securities violations "actually occurred" is "not dispositive of the antitrust immunity issue," which is whether these suits "impair [the SEC's] ability to carry out its regulatory obligations." Pet. App. 129a n.2; see U.S. Br. 11. Rather, the critical question is whether implied repeal is necessary to make the securities laws function as Congress intended and to permit the SEC to carry out its responsibilities "free from the disruption of conflicting judgments that might be voiced by courts exercising jurisdiction under the antitrust laws." *NASD*, 422 U.S. at 734.

A potential conflict requiring immunity may exist when the antitrust laws prohibit conduct that the SEC is empowered to permit, prohibit, or otherwise regulate. See *NASD*, 422 U.S. at 729 (implying immunity where the SEC's "authority to determine whether and to what extent [challenged restrictions] should be tolerated" could not be reconciled "with the Sherman Act's declaration that they are illegal"); *Gordon*, 422 U.S. at 691 (implying immunity where Con-

gress left "supervision of the fixing of reasonable rates of commission to the SEC," even though the fixing of commission rates would violate the Sherman Act). When a jury applying antitrust law standards might condemn conduct that the SEC closely regulates applying securities law standards, the SEC's discretion to alter the boundaries between permissible and impermissible activities (or to decide what manner of enforcement will be most effective) requires immunity to protect the regulatory scheme—even if the SEC prohibits some of the conduct at issue.

Accordingly, though at the time *Gordon* was decided fixed commission rates were prohibited under both the securities and antitrust laws, this Court implied antitrust immunity because the SEC had the power to reintroduce fixed commission rates if conditions warranted. 422 U.S. at 691. In *Trinko* this Court observed that had it not been for an antitrust savings clause the regulatory scheme created by the Telecommunications Act would have been a "good candidate for implication of antitrust immunity," even though plaintiffs alleged a clear violation by Verizon of its statutory duty "to share its network with competitors." 540 U.S. at 401, 406. The Court made that determination despite the fact that, after FCC and state investigations, Verizon had entered into a consent decree under the telecommunications laws and paid millions of dollars to the United States and competitors. *Id.* at 403-405.

Other decisions addressing diverse regulatory regimes confirm that the question whether conduct is unlawful under the regulatory scheme is not determinative of implied immunity. In *Pan Am. World Airways* v. *United States*, 371 U.S. 296 (1963), the Civil Aeronautics Board had condemned a joint ownership arrangement that limited air carrier routes and divided territories, barred a similar joint venture, and even urged the Department of Justice to challenge the arrangement. *Id.* at 298, 300 n.5, 305 & n.10. The CAB left no doubt that the arrangement was "out of harmony with the

[FAA's] statutory standards for competition." *Id.* at 311. This Court nevertheless held that an antitrust challenge to the arrangement "should have been dismissed" because whether "transactions of that character meet the standards of competition and monopoly provided by the [FAA] is peculiarly a question for the Board." *Id.* at 309, 313 & n.19. The Court in *Pan Am* reasoned that if courts were to entertain the antitrust claims, "two regimes might collide." *Id.* at 310. Only two Justices thought that "repeal of the antitrust laws by implication" was contradicted by the "abuses disclosed by the record." *Id.* at 320, 325, 328 (Brennan, J., & Warren, C.J., dissenting).

In *Brown* v. *Pro Football*, 518 U.S. 231, 235 (1996), this Court implied immunity from a private antitrust suit filed after the defendants "unilaterally implemented" a change in terms of employment. That conduct could have been characterized as a violation of federal labor laws, which allow unilateral implementation only under "carefully circumscribed conditions" (*id.* at 238)—which the dissent believed had not been satisfied. *Id.* at 256-257 (Stevens, J., dissenting). The fact that the defendants' conduct was arguably in violation of the labor laws did not bar immunity. It instead was a strong reason for "tak[ing] from antitrust courts the authority to determine * * * what is socially or economically desirable collective-bargaining policy." *Id.* at 242. See generally *Davis* v. *Scherer*, 468 U.S. 183, 194 (1984) (defendants "do not lose their qualified immunity merely because their conduct violates some statutory or administrative provision").

Plaintiffs' effort to strip immunity from any antitrust defendant who is alleged to have violated a federal regulatory standard has the law backwards. A suit that makes such an allegation raises issues that call for application of the standards of the expert agency. In the present cases, the leading treatise has observed, "permitting the antitrust challenge permits a jury to decide an issue that gave the SEC's own experts considerable difficulty." AREEDA & HOVENKAMP

¶ 243a, at 77 (Supp. 2006). That is precisely the situation in which the risk to the federal regulatory scheme from "[m]istaken inferences" and "false condemnations" resulting from an antitrust jury delving into issues that "are difficult for [it] to evaluate" is at its greatest and the case for implied immunity most compelling. *Trinko*, 540 U.S. at 414.

2. Immunity must be extended to the tie-in and excessive commissions allegations because application of the antitrust laws would conflict with the SEC's authority to define manipulation.

Contrary to plaintiffs' assertions, the danger of conflicting standards is very real here. The SEC has drawn fine lines between permissible book-building activity and unlawful tie-in agreements. *Allocations Release*, Pet. App. 216a-233a; U.S. Br. 15. Lawful book-building includes conversations between an underwriter and a potential IPO purchaser about the investor's aftermarket interest in a stock at various prices and its intention to build a long-term position rather than "flip" the stock. *Id.* at 224a, 227a-228a. The SEC recognizes that collecting such information is "an essential part of the book-building process." *Id.* at 223a; see *supra*, pp. 3-4. Statements that commitments to buy in the immediate aftermarket will result in an allocation of shares in the IPO, however, may be unlawful. Pet. App. 216a-217a.

Accordingly, under SEC guidelines communications like those alleged by plaintiffs "may or may not be permissible, depending upon the facts." Pet. App. 156a; see U.S. Br. 15 (plaintiffs' allegations "encompas[s] permissible book-building conduct between underwriters and investors that the SEC has specifically approved as important in determining the size and price of the offering as well as the allocation of shares, based on understanding long-term investor interest in and valuation of the company"). The difference between a beneficial conversation about a customer's aftermarket interest and a potentially impermissible one linking allocations to trading activity in the immediate aftermarket may turn on a

few words, or no words at all, in each of tens of thousands of discussions that took place between underwriters and potential investors in the 900 IPOs at issue.

The importance of such nuanced factual distinctions confirms the need for antitrust immunity in these cases. Plaintiffs' tie-in allegations raise delicate, fact-intensive questions under the securities laws that require regulatory expertise to resolve. Immunity is necessary precisely because antitrust courts—operating outside the framework of the SEC's regulations and the safeguards that Congress and the courts have applied to securities litigation—might "impose different standards or requirements" than the SEC would impose in exercising its regulatory authority. *Gordon*, 422 U.S. at 689; see *Trinko*, 540 U.S. at 406; *Brown*, 518 U.S. at 240-242.

Allowing antitrust courts and juries to determine whether underwriters' communications with customers are lawful or unlawful would deter underwriters from making inquiries that the SEC says are "essential" to the success of an IPO. Pet. App. 223a; see U.S. Br. 9; *Brown*, 518 U.S. at 241-242 (describing the dilemma created for regulated entities when conduct permitted under the administrative scheme nevertheless "invites a later antitrust claim"). Absent immunity, the SEC has declared, its determination that book-building inquiries benefit the capital markets would be "supplanted" and its "ability to interpret, apply, and revise the governing law" based on "complex considerations of fact, law and policy" would be displaced by the need for underwriters to steer well clear of any conduct that an antitrust court could view as a basis for treble damages liability. Pet. App. 156a, 194a-196a; see NASD Br. 1, 8.

Whether a commission payment violates the securities laws is a complex question that securities regulators and antitrust courts may decide differently. The difficulty of analyzing the facts concerning commission payments and the need for securities expertise in conducting that analysis are illustrated by *Dep't of Enforcement* v. *Invemed Assocs.*, *supra*.

There, an NASD panel concluded that the securities laws do not prohibit underwriters from preferring good customers in allocating IPO shares and that customers may voluntarily increase order flow and commission payments to increase their chances of obtaining IPO allocations. After painstakingly reviewing testimony concerning particular customer relationships, customer intentions, and commission payments, as well as statistical and other expert evidence, the panel concluded that higher-than-normal commissions paid on 700 trades by customers seeking IPO allocations did not violate NASD rules and that no illicit agreements or "bribes" were involved. There is no reason to expect that a jury applying general antitrust criteria could conduct that analysis correctly.

The SEC explained below that the need to avoid "false condemnations" and "interminable litigation" under the antitrust laws would sharply influence underwriters' conduct, regardless of the judgments made by securities regulators. Pet. App. 157a, 197a; *Trinko*, 540 U.S. at 412, 414; see U.S. Br. 9; *Town of Concord* v. *Boston Edison*, 915 F.2d 17, 22 (1st Cir. 1990) (Breyer, C.J.). Judge Easterbrook has observed that case-by-case inquiry under the antitrust laws, because it is "certain to produce errors galore," forces businesses to avoid "beneficial practices that create risks of condemnation" and carries "great potential to injure the economy by misunderstanding and condemning complex practices." Easterbrook, *Ignorance and Antitrust*, in ANTITRUST, INNOVATION, AND COMPETITIVENESS 119, 127-131 (1992). That risk of injury is unnecessary when the challenged practices are already subject to close oversight by the SEC, which engages in rulemaking that permits all interested parties to comment and which balances competition with other important goals of the securities laws. See *Far East Conf.* v. *United States*, 342 U.S. 570, 574-575 (1952) (agencies are "better equipped than courts by specialization, by insight gained through experience, and by more flexible procedure" to "ascertai[n] and interpre[t] the circumstances" and ensure "[u]niformity and consistency in the regulation of business").

3. Immunity must also be implied because plaintiffs' allegations are "inextricably intertwined" with conduct permitted under the securities laws.

We believe that the need for immunity in these cases is settled by the standards laid down by this Court in *Gordon*, *NASD*, and *Trinko*, see Part I, *supra*. But immunity is also required under the test proposed by the United States, which would imply immunity when plaintiffs allege "activities that are directly related to and cannot practically be separated from" conduct the SEC permits. U.S. Br. 11. The United States correctly observed that "[f]ailure to recognize immunity for activities that are inextricably intertwined with permissible collaborative conduct could effectively vitiate the immunity for the authorized conduct and thus conflict with the regulatory scheme." *Ibid.*

As we have described in Part III.A.2, *supra*, allowing courts and juries applying the antitrust laws to second guess the fine lines drawn by securities regulators between lawful and unlawful underwriter communications and commissions will effectively obliterate those expertly drawn distinctions, deterring conduct that the SEC and NASD have concluded is permissible and beneficial. In those circumstances there is no doubt that plaintiffs' tie-in and commission allegations are so closely related to conduct that the SEC and NASD permit that a failure to imply immunity would destroy the immunity for authorized conduct.

Furthermore, plaintiffs concede that they rely on defendants' "participation in permitted activities" to establish the inference that "they form[ed] or implement[ed] a prohibited conspiracy to inflate their charges." Pl. Supp. Br. 9. Plaintiffs have no other choice because, as the United States recognized, without their "theater-wide attack on the syndicate system" and other authorized activities, the complaint is devoid of allegations capable of establishing concerted activity. U.S. Br. 14-15. Absent those allegations, there would remain only conclusory assertions that defendants conspired (by

some unspecified means) to impose anticompetitive charges on IPO allocants. Such assertions are insufficient to permit this case to proceed.[6]

B. The Possibility That A Rule Of Reason Analysis May Take Into Consideration The Securities Regulatory Background Is No Reason To Deny Implied Immunity.

The court of appeals thought that the applicability of a rule of reason analysis "lowers the stakes of any implied immunity evaluation" by "alter[ing] the antitrust analysis in an antitrust defendant's favor." Pet. App. at 58a, 60a. The suggestion that implied immunity analysis may differ if a rule of reason applies finds no support in this Court's decisions. In *Silver*, the Court recognized that a rule of reason may afford the NYSE "breathing space," but undertook that analysis only *after* determining that implied immunity was unavailable. 373 U.S. at 360-361.

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[6] Plaintiffs should not be given the opportunity to amend their pleadings, several years and two appeals after they commenced this litigation. The Billing plaintiffs previously amended their complaint, switching its focus from allegations that defendants violated securities laws to generalized allegations of collusion. Compare D. Ct. Dkt. No. 1 ¶¶ 3, 35 with J.A. 27-31 ¶¶ 44-64, 67. Given the direct applicability of *Gordon* and *NASD* to these claims, and the substantial threat this litigation poses to capital formation, the district court's dismissal with prejudice was proper. See *NASD*, 422 U.S. at 697, affirming the dismissal with prejudice at 374 F. Supp. 95, 114 (D.D.C. 1973); *Hochfelder*, 425 U.S. at 215; *Van Buskirk* v. *N.Y. Times*, 325 F.3d 87, 91-92 (2d Cir. 2003) (dismissal is with prejudice when the complaint is "not reasonably susceptible" to an interpretation that cures the legal deficiency and provides no "'indication that a valid claim might be stated'"). Plaintiffs, moreover, "never sought leave to amend" after the district court dismissed (*Mandarino* v. *Mandarino*, 2006 WL 1308076, at *2 (2d Cir. 2006)), but chose to appeal based on those pleadings. It is too late now for them to rewrite their claims. See *Kirsch* v. *Fleet Street*, 148 F.3d 149, 171 (2d Cir. 1998); *Walton* v. *Morgan Stanley & Co.*, 623 F.2d 796, 799 n.7 (2d Cir. 1980).

The court of appeals' view that a rule of reason analysis lessens the need to imply immunity also misses the fundamental point that competition is not the sole or primary objective of the securities regulatory regime. The essence of the rule of reason is to examine whether the challenged activity promotes or suppresses competition. *National Soc'y of Prof'l Eng'rs* v. *United States*, 435 U.S. 679, 688 (1978). Securities regulation, by contrast, balances competition with other important goals like market efficiency and capital formation. *Supra*, pp. 9-10. Given the SEC's broader mandate, which a rule of reason analysis would not duplicate, immunity is of "paramount importance" to avoid "undermin[ing]" the "capital formation process" and disrupting our "vitally important financial markets." U.S. Br. 9.

A rule of reason inquiry would magnify rather than ameliorate the "instability and uncertainty" that antitrust suits would inject into the securities regulatory scheme. *Brown*, 518 U.S. at 242. Even "[j]udges often lack the expert understanding of industrial market structures and behavior to determine with any confidence a practice's effect on competition." *Arizona* v. *Maricopa County Med. Soc'y*, 457 U.S. 332, 343 (1982). It is nothing short of "fantastic" to assume that a jury untrained in law or economics could effectively conduct a cost-benefit analysis in the complex circumstances of these cases. Easterbrook, *The Limits of Antitrust*, 63 TEX. L. REV. 1, 11 (1984); see Austin, *The Jury System at Risk from Complexity, the New Media, and Deviancy*, 73 DENV. U.L. REV. 51, 54 (1995); HOVENKAMP, ANTITRUST ENTERPRISE at 63-64. A rule of reason analysis, far from contradicting defendants' claim to immunity, *requires* implied repeal under this Court's precedents.

CONCLUSION

The judgment of the court of appeals should be reversed. The district court's judgment dismissing the complaints with prejudice should be reinstated.

Respectfully submitted.

ROBERT B. MCCAW
LOUIS R. COHEN
ALI M. STOEPPELWERTH
FRASER L. HUNTER, JR.
NOAH A. LEVINE
WILMER CUTLER PICKERING
HALE & DORR LLP
399 Park Avenue
New York, New York 10022
(212) 230-8800
Attorneys for Petitioner Citigroup Global Markets Inc.

ANDREW J. FRACKMAN
TIMOTHY J. MURIS
RICHARD G. PARKER
BRENDAN DOWD
O'MELVENY & MYERS LLP
Seven Times Square
New York, New York 10036
(212) 326-2000
Attorneys for Petitioner Robertson Stephens, Inc.

CARTER G. PHILLIPS
A. ROBERT PIETRZAK
JOEL M. MITNICK
SIDLEY AUSTIN LLP
787 Seventh Avenue
New York, New York 10019
(212) 839-5300
Attorneys for Petitioner Deutsche Bank Securities Inc.

STEPHEN M. SHAPIRO
Counsel of Record
KENNETH S. GELLER
TIMOTHY S. BISHOP
JOHN P. SCHMITZ
MAYER, BROWN, ROWE & MAW LLP
1909 K Street, N.W.
Washington, D.C. 20006
(202) 263-3000
Attorneys for Petitioner Merrill Lynch, Pierce, Fenner & Smith Incorporated

ANDREW B. CLUBOK
BRANT W. BISHOP
KIRKLAND & ELLIS LLP
655 15th Street, N.W.
Washington, D.C. 20005
(202) 879-5000
Attorneys for Petitioner Morgan Stanley & Co. Inc.

SHEPARD GOLDFEIN
PREETA D. BANSAL
JAMES A. KEYTE
SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP
Four Times Square
New York, New York 10036
(212) 735-3000
Attorneys for Petitioner Janus Capital Management LLC

RICHARD A. CIRILLO
KAREN R. KOWALSKI
KING & SPALDING LLP
1185 Avenue of the Americas
New York, New York 10036
(212) 556-2100
Attorneys for Petitioner
Credit Suisse Securities (USA) LLC

MOSES SILVERMAN
PHILIP G. BARBER
PAUL, WEISS, RIFKIND,
WHARTON & GARRISON LLP
1285 Avenue of the Americas
New York, New York 10019
(212) 373-3000
Attorneys for Petitioner
Lehman Brothers Inc.

JON R. ROELLKE
JEFFREY H. DRICHTA
CLIFFORD CHANCE US LLP
2001 K Street, N.W.
Washington, D.C. 20006-1001
(202) 912-5000
Attorneys for Petitioner
Merrill Lynch, Pierce,
Fenner & Smith Incorporated

PAUL GONSON
GLENN R. REICHARDT
KIRKPATRICK & LOCKHART
PRESTON GATES ELLIS LLP
1601 K Street, N.W.
Washington, D.C. 20006
(202) 778-9000
Attorneys for Petitioner
Merrill Lynch, Pierce,
Fenner & Smith Incorporated

GANDOLFO V. DIBLASI
PENNY SHANE
DAVID M.J. REIN
RICHARD J.L. LOMUSCIO
SULLIVAN & CROMWELL
LLP
125 Broad Street
New York, New York 10004
(212) 558-4000
Attorneys for Petitioners
The Goldman Sachs Group,
Inc. and Goldman, Sachs &
Co.

RANDY M. MASTRO
JOHN A. HERFORT
RICHARD FALEK
GIBSON, DUNN &
CRUTCHER LLP
200 Park Avenue
New York, New York 10166
(212) 351-4000
Attorneys for Petitioner
Bear, Stearns & Co., Inc.

STEVEN WOLOWITZ
MATTHEW INGBER
MAYER, BROWN, ROWE &
MAW LLP
1675 Broadway
New York, New York 10019
(212) 506-2500
Attorneys for Petitioner
Comerica, Inc.

GERALD J. FIELDS
KEVIN C. LOGUE
PAUL HASTINGS JANOFSKY
& WALKER LLP
75 East 55th Street
New York, New York 10022
(212) 318-6000
Attorneys for Petitioners Van Wagoner Capital Management, Inc. and Van Wagoner Funds, Inc.

JOHN D. DONOVAN, JR.
ROBERT G. JONES
ROPES & GRAY LLP
One International Place
Boston, Mass. 02110
(617) 951-7000
Attorneys for Petitioners Fidelity Distributors Corp., Fidelity Brokerage Services LLC, and Fidelity Investments Institutional Services Co., Inc.

JANUARY 2007

No. 05-1157

IN THE

Supreme Court of the United States

CREDIT SUISSE SECURITIES (USA) LLC, ET AL.,

Petitioners,

—v.—

GLEN BILLING, ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT MILTON PFEIFFER

RUSSEL H. BEATIE
Counsel of Record
BEATIE AND OSBORN LLP
521 Fifth Avenue
New York, New York 10175
(212) 888-9000

Attorneys for Respondent Milton Pfeiffer

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QUESTIONS PRESENTED

Did the United States Court of Appeals for the Second Circuit properly formulate and apply the law of immunity to the Robinson- Patman Act commercial bribery claim stated in the *Pfeiffer* Complaint?

Does the commercial bribery claim under section 2(c) of the Robinson-Patman Act, 15 U.S.C. § 13(c), need to be restated in order to eliminate inextricable intertwining of lawful conduct and illegal conduct pleaded in the Complaint?

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STATEMENT OF THE CASE

In 1998 and 1999 the Petitioner investment banking/broker-dealer firms[1] ("investment banking firms" or investment banking Petitioners") and the Petitioner institutional investor firms[2] ("investor firms" or "investor Petitioners") found themselves in an extraordinary but not unique hot issue initial public offering ("IPO") market, devoted primarily to green technology companies. They took advantage of this by adopting a secret plan by which they would maximize their profits at the expense of the unknowing investing public.

Although the hot issue market virtually guaranteed a substantial premium on an IPO for any technology company, the investment banking Petitioners took steps to insure that the premium would be as large as possible by violating the antitrust laws. Their plan was not new. Similar abuses of hot issue IPO markets had taken place in the past, i.e., 1963 and 1984.[3] *See* Pet'rs Br. 12-13.

The complaint filed by the Securities and Exchange Commission ("SEC") against Credit Suisse First Boston Corporation ("CSFB"), and the complaints against other firms (*see* Pet'rs Br. 14) show that the allegations in the

---

[1] Credit Suisse First Boston Corp., The Goldman Sachs Group, Inc., Lehman Brothers, Inc., Merrill Lynch, Pierce, Fenner & Smith, Inc., Morgan Stanley Dean Witter & Co., BancBoston Robertson, Stephens, Inc., and Salomon Smith Barney, Inc.

[2] Fidelity Distributors Corporation, Fidelity Brokerage Services LLC, Fidelity Investments Institutional Services Co., Janus Capital Corporation, Coamerica, Inc. d/b/a Munder Capital Management, Van Wagoner Capital Management, Inc., and Van Wagoner Funds, Inc.

[3] These reports from three separate hot issue IPO markets may have efficiently identified the misconduct; but they and their aftermath showed the Securities and Exchange Commission to be incapable of halting or deterring the same misconduct.

Complaint filed by Respondent Milton Pfeiffer ("Pfeiffer" or "Respondent") describing extraordinary misconduct in the aftermarket for the hot issue IPO's were not made "on information and belief" or on the basis of "inferences" from sparse facts. The CSFB complaint, with its detailed allegations, charts, and descriptions of specific financial transactions, achieves a level of specificity far beyond that necessary to satisfy Rule 9 of the Federal Rules of Civil Procedure.

Prior to the effective date of each hot issue IPO, the investor Petitioners and the investment banking Petitioners agreed that the investor firms would "on command" buy large blocks of the IPO stock in the aftermarket in order to drive the price of the IPO stock up, and not sell the shares until they received the "green light" from the investment banking Petitioners, when the stock had peaked and had begun its downward spiral. These transactions violated statutory provisions of the Securities Act of 1933 (the "1933 Act") and the Securities Exchange Act of 1934 (the "1934 Exchange Act"). The 1933 Act, at section 17(a) provides:

> It shall be unlawful for any person in the offer or sale of any securities . . .
>
> (1) to employ any device, scheme, or artifice to defraud, or
>
> (2) to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or
>
> (3) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser.

15 U.S.C. § 77q(a). The 1934 Exchange Act, at section 9(a)(2) states that it shall be unlawful for any person:

> To effect, alone or with one or more other persons, a series of transactions . . . creating actual or apparent active trading in such security or raising or depressing the price of such security, for the purpose of inducing the purchase or sale of such security by others.

15 U.S.C. § 78i(a)(2).

The investment banking Petitioners arranged for the investor Petitioners and others to make large purchases in the aftermarket for the IPO issues "upon command" at prices greater than the IPO price, a direct violation of section 9(a)(6) of the 1934 Exchange Act, the stabilization statute. The stabilization statute makes it unlawful for any person:

> To effect . . . any series of transactions for the purchase and/or sale of any security registered on a national securities exchange for the purpose of pegging, fixing, or stabilizing the price of such security *in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.*

15 U.S.C. § 78i(a)(6) (emphasis added). This statute allowed the SEC discretionary rule-making power, a circumstance Petitioners were able to abuse. For example, could the Petitioners "stabilize" six months, one year, or two years after the effective date of the IPO?

In addition, the investment banking firms moved their analyst departments to the corporate finance or investment banking departments. There, the analysts were controlled by the personnel in charge of the hot issue IPOs.

In spite of the fact that in almost all cases the hot issue IPO companies had very limited analyzable or reportable business operations, customers, functional or marketable products, and records of sales or profits, the analysts, working under the control of the investment banking personnel, issued "strong buy," "buy," "outperform the market," and "hold" recommendations for the IPO hot issues in violation of section 17(a) of the 1933 Act and section 10(b) of the 1934 Exchange Act. These recommendations had the effect of driving the market price for the IPO hot issues higher. The statements made in the recommendations were false and known to be false, were made without any basis whatsoever in fact, and violated the following securities laws: 1933 Act, § 17(a); 15 U.S.C. § 77q(a); Securities 1934 Exchange Act, § 9(a)(4); 15 U.S.C. § 78(a)(4). Section 9(a)(4) of the 1934 Exchange Act makes it unlawful for any person:

> To make . . . any statement which was at the time and in the light of the circumstances under which it was made, false or misleading.

15 U.S.C. § 78i(a)(4). In the operation of the national securities markets, the SEC could not "regulate" these practices by making them legal or lawful, nor could the SEC require the conduct the statutes make unlawful.

Prior to an IPO, the investment banking firms and the investor firms agreed that the investor firms would transfer one- third of their IPO profits to the investment banking firms. Taking advantage of directions from the investment banking firms, who gave them a cue for the proper time to sell the hot issue IPO securities, i.e., when the market price for the IPO security could no longer be sustained at its inflated level, the investor firms sold the IPO securities and collected extraordinary profits. Pursuant to their agreement with the investment banking Petitioners, who knew the prices at which the

IPO hot issue securities had been bought and sold, and could, therefore, calculate the profits realized by the investor firms (J.A. 69, ¶¶ 26-45), the investor firms executed a series of transactions in unrelated non-IPO hot issue securities for their institutional investor clients. The ordinary commission on a transaction of this sort during this period would have been five or six cents per share. J.A. 73-74, ¶ 46. In fact, however, the investor firms paid as much as a dollar per share as a commission on the sale or purchase of these unrelated securities. J.A. 74-76, ¶¶ 50-52. These transactions continued until the syndicate managers of the investment banking Petitioners determined that they had received sufficient excessive commissions to pay them their share of the investor Petitioners' profits on the purchase and sale of the IPO hot issue securities. Finally, splitting profits from trading in a manipulated security is both a civil and a criminal violation of the 1934 Exchange Act. *United States v. Cusimano*, 123 F.3d 83, 87-88 (2d Cir. 1997); *United States v. Libera*, 989 F.2d 596, 599-600 (2d Cir. 1993). The SEC cannot make splitting profits from manipulation lawful.

The recitation of these transactions and the payment of the profits realized from them may sound like a chapter from *Alice in Wonderland*. For that reason, we have included in the Joint Appendix a copy of the complaint investigated and filed by the SEC against CSFB approximately one year after the *Pfeiffer* Complaint with its strikingly similar allegations had been filed in the United States District Court for the Southern District of New York. J.A. 63-85. The SEC was able to plead specific details by virtue of its practice of subpoenaing records and testimony under an Order of Investigation, which allows it to conduct discovery before it files a complaint. The payments made by CSFB to its investment banking/broker-dealer clients are shown in box charts appear-

ing in the Joint Appendix at pages 73 through 82, paragraphs 46 through 66. Pfeiffer in his Complaint asserts that the payments made by excessive commissions constituted commercial bribery in violation of section 2(c) of the Robinson-Patman Act, 15 U.S.C. § 13(c).

When misconduct by the investment banking Petitioners became sufficiently known to be pleaded by private plaintiffs seeking recovery of the losses they sustained as a result of the extraordinary greed of the investment banking firms, more than three hundred securities fraud cases and two separate antitrust cases were filed. The antitrust and securities cases were grouped according to the nature of their claims, assigned in each case to a single judge for prosecution, and consolidated for pretrial proceedings. The securities cases were assigned to United States District Judge Shira Scheindlin; the two antitrust cases were assigned to United States District Judge William H. Pauley, III.

In the securities cases the defendants moved to dismiss, and their motion was denied. The securities plaintiffs then moved for class certification under Rule 23 of the Federal Rules of Civil Procedure, and their motion was granted. The defendants in the securities cases, Petitioners here also, appealed certification of the class to the United States Court of Appeals for the Second Circuit. The Second Circuit reversed and remanded without leave to replead, *In re Initial Pub. Offering Sec. Litig.*, 471 F.3d 24 (2d Cir. 2006), and plaintiffs moved for rehearing *en banc*.

In the antitrust cases assigned to Judge Pauley, the Petitioners moved to dismiss on two grounds, immunity from the antitrust laws and lack of antitrust standing. Judge Pauley granted the motion to dismiss on the ground of immunity and did not consider the arguments on standing. *In re Initial Pub. Offering Antitrust Litig.*,

287 F.Supp.2d 497 (S.D.N.Y. 2003). The antitrust Respondents appealed to the Second Circuit, which vacated the decision by the District Court and remanded the case for further proceedings consistent with its opinion. *Billing v. Credit Suisse First Boston Ltd.*, 426 F.3d 130, 164 (2d Cir. 2005), *cert. granted*, 127 S.Ct. 762 (2006) (A copy of the decision is contained in Petitioners' certiorari petition. Cert. Pet. at 57a.) The investment banking Petitioners and institustional investor Petitioners moved for rehearing *en banc*. When that motion was denied, they applied to this Court for certiorari, which was granted.

From the time the Petitioners filed the first motion in this case, they have persistently and, given the numerous complaints on our part, intentionally misrepresented the claims in the *Pfeiffer* Complaint. Pfeiffer seeks recovery for misconduct in the hot issue IPO aftermarket in the form of commercial bribery violating section 2(c) of the Robinson-Patman Act, 15 U.S.C. 13(c). The bribes were the excessive commissions, which represented the agreed upon percentage of the profits on trading in the IPO securities. Pfeiffer does not make claims involving underwriting activities in our Complaint, nor do we even mention "roadshows," "building the book," "indications of interest," "meetings of officers," or other practices representing, we are told, the lifeblood of the United States capital markets. These buzz words do not appear in the *Pfeiffer* Complaint. The *Billing* Complaint, presenting the Sherman Act claim, on the contrary, emphasizes underwriting practices as major parts of its claims.

SUMMARY OF ARGUMENT

This case involves the issue presented when the antitrust laws and a regulatory statute overlap, here the issue of immunity from the antitrust laws for IPO transactions in the national securities markets that are regulated by the Securities Act of 1933 and the Securities Exchange Act of 1934. The various statutes must be construed to determine whether or not repeal of the antitrust laws on the facts in the *Pfeiffer* case must be implied in order to make the securities laws work; and if repeal of the antitrust laws must be implied, the minimum amount necessary for that purpose.

Petitioners do not seek the minimum implied repeal. Instead, they seek a general gaol delivery in which the antitrust laws are fully repealed, the Petitioners keep their monstrous unlawful profits, and they escape without a scratch. Of course, Petitioners also oppose any amendment of the pleadings that would allow the antitrust actions to go forward. Pet'rs Br. 49 n. 6.

In order to determine that implied repeal of the antitrust laws is required under the present circumstances, we must find a "clear repugnancy between the antitrust laws and the regulatory system" governing the national securities markets, *U.S. v. National Ass'n of Sec. Dealers, Inc.*, 422 U.S. 694, 719-20 (1975), or a "potential specific conflict between the antitrust laws and a regulatory regime," *Billing*, 426 F.3d at 164. In the *Pfeiffer* Complaint, Respondent asserts only a claim for commercial bribery that violates section 2(c) of the Robinson-Patman Act, 15 U.S.C. § 13(c). Because the issue came to this Court procedurally in a motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure, the Court should determine whether the lower courts properly applied that rule. The Court of Appeals,

searching for a "potential conflict" between the legal elements necessary to establish a claim for commercial bribery and the IPO regulatory framework, proceeded properly. The District Court, as the brief for the United States contends, did not. Instead of evaluating the elements of the claim, the District Court wrote an unfocused essay covering the background, motives, and means pleaded in the Complaint. The Court ignored extraordinary misconduct by the investment banking Petitioners and the investor Petitioners.

The elements of a claim for commercial bribery (payment of a bribe across the buyer-seller line, a fiduciary relationship, receipt of personal benefit, and secrecy of the bribe, *see Harris v. Duty Free Shoppers Ltd. P'ship*, 940 F.2d 1272, 1274 (9th Cir. 1991); *Stephen Jay Photography, Ltd. v. Olan Mills, Inc.*, 903 F.2d 988, 993 (4th Cir. 1990); *Grace v. E.J. Kozin Co.*, 538 F.2d 170, 173 (7th Cir. 1976), do not demonstrate any "clear repugnancy between the antitrust laws and the regulatory system," or a "potential specific conflict." Other factors pleaded in the *Pfeiffer* Complaint, including false analyst reports, and prearranged or directed transactions in the aftermarket, i.e., tie-in and laddering transactions, merely explain the motives of the parties to the transactions at issue and the means by which they carried out their unlawful scheme, e.g., accumulation and division of illegal profits from manipulation. Even if the fraudulent analyst reports, the prearranged or directed transactions, or the exorbitant commissions, were deemed by the Court to be necessary elements of a claim for commercial bribery that violates the Robinson-Patman Act, they do not create the necessary "clear repugnancy" between the Robinson-Patman Act and the federal securities laws because they are unlawful under the congressional statutory scheme for both. And if they are deemed by the Court to be necessary parts of the

antitrust violations alleged here, they present no potential conflict with the securities laws because they are also unlawful conduct under specific provisions of the federal securities laws, i.e., the 1933 Act and the 1934 Exchange Act. The SEC can never by rule or regulation create a "potential conflict" with the antitrust laws by making lawful, securities practices that are unlawful by statute.

The Court should bear in mind that underwriting practices emphasized in the *Billing* Complaint (the other antitrust complaint) and the *amicus* brief of the United States, are not pleaded or even mentioned and are completely unnecessary to the *Pfeiffer* Complaint. Hence, the lengthy discussion of underwriting and indispensable practices like "roadshows," "building the book," "indications of interest," conversations with customers, and meetings of officers, etc., in Petitioners' brief should play no role in the assessment of the *Pfeiffer* Complaint.

ARGUMENT

PFEIFFER'S CLAIM FOR COMMERCIAL BRIBERY UNDER SECTION 2(C) OF THE ROBINSON-PATMAN ACT, 15 U.S.C. § 13(c), PRESENTS NO POTENTIAL CONFLICT WITH THE REGULATORY SCHEME OF THE SECURITIES LAWS AND NO OTHER BASIS FOR IMPLIED REPEAL OF THE ANTITRUST LAWS

No matter what Petitioners or our co-Respondent say in their briefs, this is an aftermarket case, not an underwriter case. Petitioners argue that they should not "pay the piper" for their greedy conduct in the aftermarket trading for the hot issue IPOs; nor should they disgorge their unlawful profits to the public investors victimized by their scheme. Petitioners simply cannot with a

straight face deny unlawful conduct. The issue before the Court, therefore, is the existence of rights and remedies for the investing public against the investment banking and investor Petitioners, specifically their exposure to treble damages under the antitrust laws.

The antitrust laws are more important in the circumstances at hand than they would normally be. Petitioners repeatedly claim in their brief that the antitrust actions have no significance because the antitrust claimants will be compensated by the IPO securities class action in which they are participants. Pet'rs Br. 7, 33. True if . . . but only if . . . the Court of Appeals had not reversed the class certification for the securities plaintiffs and remanded without leave to replead the class allegations on the ground that no valid class could be established. *In re Initial Pub. Offering Sec. Litig.*, 471 F.3d 24, 42, 45 (2d Cir. 2006). Without a class the securities plaintiffs have no claim they can reasonably prosecute to judgment or settlement because the individual claims are too small to justify the expense. That leaves the participants in the hot issue IPO market with no reasonable way to assert their claims except in the antitrust class action. Moreover, even if those claims are pursued in some form, in spite of Petitioners' undeniable malfeasance, they will not be liable for punitive damages, *Manufacturers Hanover Trust Co. v. Drysdale Sec. Corp.*, 801 F.2d 13, 29 (2d Cir. 1986), or for their fraud.

The private litigant is important to the enforcement of the federal securities laws and the federal antitrust laws.[4]

[4] Petitioners equate use of the antitrust laws to abuse of the federal securities laws. All restrictions passed by the tort reform proponents were intended to halt abuses of the federal securities laws. The purpose of the legislation that modified the federal securities laws was to halt abusive practices by securities plaintiffs, not to preclude or reduce claims under the antitrust laws.

Basic Inc. v. Levinson, 485 U.S. 224, 231 (1988) ("private cause of action exists for a violation of § 10(b) and Rule 10b-5, and constitutes an essential tool for enforcement of the 1934 Act's requirements"); *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 196 n.16 (1976); *Reiter v. Sonotone Corp.*, 442 U.S. 330, 344 (1979) ("Congress created the treble-damages remedy . . . precisely for the purpose of encouraging *private* challenges to antitrust violations. These private suits provide a significant supplement to the limited resources available to the Department of Justice for enforcing the antitrust laws and deterring violations.") (emphasis in original); *Lawlor v. National Screen Serv. Corp.*, 349 U.S. 322, 329 (1955); *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 486 n.10 (1977).

POINT I

THE SECOND CIRCUIT PROPERLY APPLIED THE REQUIREMENTS FOR IMPLIED REPEAL OF THE ANTITRUST LAWS

This case requires an assessment of two bodies of statutory law to determine whether immunity from the antitrust laws should be implied for the Petitioners. When construing a congressional statute, a court should look first to the language of the statute to determine whether or not the intent of Congress is clear on its face. *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997); *American Tobacco Co. v. Patterson*, 456 U.S. 63, 68 (1982); *Hernandez v. Ashcroft*, 345 F.3d 824, 838 (9th Cir. 2003). If the intent is not clear, and in the present case it is not, the court must seek congressional intent by a variety of factors relevant to the legislation. *See, e.g., Robinson*, 519 U.S. at 341-46; *Dobrek v. Phelan*, 419 F.3d 259, 264-67 (3d Cir. 2005). This was the course fol-

lowed by the United States Court of Appeals for the Second Circuit. Pet. App. 33a-34a; 53a-56a; 57a. The fundamental rules for finding "implied immunity" have been articulated on numerous occasions. As this Court explained in *National Gerimedical Hosp. and Gerentology Ctr. v. Blue Cross*, 452 U.S. 378, 387 (1981):

> [T]his Court has faced similar claims of antitrust immunity in the context of various regulated industries. The general principles applicable to such claims are well established. The antitrust laws represent a "fundamental national economic policy." *Carnation Co. v. Pacific Westbound Conference*, 383 U.S. 213, 218, 86 S.Ct. 781, 784, 15 L.Ed.2d 364 (1966); see *Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 398-399, 98 S.Ct. 1123, 1129, 55 L.Ed.2d 364 (1978). "Implied antitrust immunity is not favored, and can be justified only by a convincing showing of clear repugnancy between the antitrust laws and the regulatory system." *United States v. National Association of Securities Dealers*, 422 U.S. 694, 719-720, 95 S.Ct. 2427, 2442-2443, 45 L.Ed.2d 486 (1975); see *Gordon v. New York Stock Exch., Inc.*, 422 U.S. 659, 682, 95 S.Ct. 2598, 2611, 45 L.Ed.2d 463 (1975); *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 350-351, 83 S.Ct. 1715, 1734, 10 L.Ed.2d 915 (1963).

After citing these fundamental rules, which can be found in the three landmark decisions involving the antitrust laws and the national securities markets, *Silver v. New York Stock Exch.*, 373 U.S. 341 (1963), *Gordon*, 422 U.S. 659, *NASD*, 422 U.S. 694, this Court then determined that the guiding factor should be congressional intent, as the Second Circuit specified in the decision at hand:

> To be sure, where Congress did intend to repeal the antitrust laws, that intent governs, *United States v. National Association of Securities Dealers, supra*; *Gordon v. New York Stock Exch., Inc., supra*, but this intent must be clear.

Gerimedical, 452 U.S. at 389. According to this decision, Congressional intent governs the finding of implied antitrust immunity in a case involving the national securities markets and the antitrust laws. Continuing, the Court said:

> Even when an industry is regulated substantially, this does not necessarily evidence an intent to repeal the antitrust laws with respect to every action taken within the industry. *E.g., Otter Tail Power Co. v. United States*, 410 U.S. 366, 372-375, 93 S.Ct. 1022, 1027-1028, 35 L.Ed.2d 359 (1973); *United States v. Radio Corp. of America*, 358 U.S. 334, 346, 79 S.Ct. 457, 464, 3 L.Ed.2d 354 (1959).

Gerimedical, 452 U.S. at 389. The United States Court of Appeals for the Second Circuit applied a specific, two-part test to the question of immunity: first, "the rare regulatory scheme pervasive enough to indicate that Congress forswore the paradigm of competition." *Billing*, 426 F.3d at 164 (citing *NASD*, 422 U.S. at 730-33). The second and far more frequent test, according to the Court of Appeals:

> . . . can arise only when there is a *potential specific conflict between the antitrust laws and a regulatory regime*.

Billing, 426 F.3d at 164 (citing *Northeastern Tel. Co. v. American Tel. and Tel. Co.*, 651 F.2d 76, 82 (2d Cir. 1981); *Strobl v. New York Mercantile Exch.*, 768 F.2d 22, 27-28 (2d Cir. 1985)) (emphasis supplied). To identify

the conflict that invokes immunity under this test, the court must

> . . . determine that Congress contemplated the specific conflict and intended for the antitrust laws to be repealed. That determination is informed by considering (1) congressional intent as reflected in legislative history and a statute's structure; (2) the possibility for conflicting mandates; (3) the possibility that application of the antitrust laws would moot a regulatory provision; (4) the history of agency regulation of the anticompetitive conduct; and (5) any other evidence indicating that the statute implies a repeal.

Billing, 426 F.3d at 164 (citing *Otter Tail Power Co. v. United States*, 410 U.S. 366, 371-76; *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 333; *Northeastern Tel. Co.*, 651 F.2d at 83-84.)

POINT II

THE ELEMENTS OF COMMERCIAL BRIBERY UNDER SECTION 2(C) OF THE ROBINSON-PATMAN ACT PROVIDE NO BASIS FOR IMPLIED REPEAL OF THE ANTITRUST LAWS

Under the Federal Rules a complaint need contain no more than a short, plain statement of the claim that demonstrates the pleader is entitled to relief. Fed. R. Civ. P. 8(a)(2). The burden on a plaintiff alleging federal antitrust violations is no greater than the burden faced by a plaintiff alleging any other cause of action not covered by the heightened pleading requirements of Rule 9. *See George C. Frey Ready-Mixed Concrete, Inc. v. Pine Hill Concrete Mix Corp., Inc.*, 554 F.2d 551, 554 (2d Cir. 1977) ("a short plain statement of a claim for relief which gives notice to the opposing party is all that is

necessary in antitrust cases"); *Nagler v. Admiral Corp.*, 248 F.2d 319, 322-23 (2d Cir. 1957); *Barr v. Dramatists Guild, Inc.*, 573 F.Supp. 555, 558 (S.D.N.Y. 1983); *Newburger, Loeb & Co. v. Gross*, 365 F.Supp. 1364, 1367-68 (S.D.N.Y. 1973); *Quality Foods de Centro America, S.A. v. Latin American Agribusiness Dev. Corp., S.A.*, 711 F.2d 989, 995 (11th Cir. 1983).

In order to assess the relationship of the commercial bribery provision and the national securities markets in a motion to dismiss under Rule 12(b)(6) on the grounds of immunity from the antitrust laws, the Court should examine the elements of the commercial bribery claim to determine whether or not they present a clear conflict with the regulatory scheme. The elements are relatively simple. The following paragraphs in the *Pfeiffer* Complaint assert all the elements:

- *Payment of a bribe across the buyer-seller line.* In paragraphs 109-15, the *Pfeiffer* Complaint explains that, when the investor Petitioners sold their securities, they collected profits that they split with the investment banking Petitioners by making large purchases and sales of unrelated securities and paying unusually large commissions. J.A. 58-59, ¶¶ 109-15.

- *Fiduciary relationship.* In paragraphs 72 and 73 of his Complaint, Pfeiffer alleges that the retail customers of the investment banking Petitioners reposed their trust in the investment banking Petitioners, and that is the basis for the Petitioners' fiduciary responsibility to their retail customers. J.A. 53-54, ¶¶ 72-73.

- *Receipt of personal benefit.* Pfeiffer alleges that the investment banking Petitioners received a personal benefit because they received rebates

from the excessive commissions the investor Petitioners paid them. J.A. 59, ¶¶ 113-15.

- *Secrecy of the bribery payment.* Pfeiffer alleges that the retail customers were unaware that their fiduciaries, the investment banking Petitioners, were receiving (or alternatively paying) bribes. J.A. 55, 59, 60, ¶¶ 83, 107-15, 121.

To assert the claim without the background, motive, and means paragraphs misused by the district judge as a basis for finding an intrusion on the regulatory scheme, only paragraphs 59, 72, 73, 83, 107-15, and 121 of the *Pfeiffer* Complaint are necessary to make a "plain, concise statement of the claim for relief." Hence, the allegations necessary for a Robinson-Patman Act violation do not involve the securities laws. The payment of a bribe across the buyer-seller line, the fiduciary relationship between retail customer and the investment banker/broker-dealer, the receipt of a benefit by the bribed party, and the secrecy of the bribe are not conduct that the SEC regulates under the federal securities laws; nor do they intrude on a pervasive regulatory scheme for IPOs. The SEC does not have the regulatory power to permit secret bribes across the buyer-seller line to a fiduciary.

The *Pfeiffer* Complaint includes non-essential allegations which supply historical background (J.A. 51-73, ¶¶ 48-71), theory (J.A. 54-75, ¶¶ 75-80), mechanisms for profits (J.A. 55-58, 60, ¶¶ 81, 82, 84-87, 91-108, 118), and the purpose of the bribe ("in exchange for favored allocations of IPO securities" (*see* J.A. 44, 54, 55, 59, ¶¶ 2, 75, 84-85, 116).) Petitioners seize upon these paragraphs to mischaracterize them as challenges to the IPO allocation process. The purpose of the bribe (for additional allocations or for performance of the aftermarket

manipulation techniques) (*see* J.A. 46-58, ¶¶ 81-82, 90-106) is immaterial to the sufficiency of the pleadings. Pfeiffer need not allege the purpose of the bribe to survive a motion to dismiss, and if those allegations are excised from the *Pfeiffer* Complaint, the Robinson-Patman Act claim still stands.

Assuming that Petitioners' manipulation of the aftermarket (conduct that establishes motive and method but is not essential to Pfeiffer's claim) requires an implied immunity analysis, a finding of implied immunity is not proper because manipulation is prohibited by statute. A finding that Petitioners' manipulation violated the antitrust laws would not conflict with securities regulation.

In short, the elements of a commercial bribery claim do not conflict with the securities laws, and the securities laws do not regulate the secret payment of a bribe across the buyer-seller line. *See, generally, Harris*, 940 F.2d at 1274; *Stephen Jay Photography*, 903 F.2d at 993; *Grace*, 538 F.2d at 173. Because the conduct induced by the bribe (tie-ins, laddering transactions, timed purchases, and false analysts' reports) manipulated the market prices of securities, this Court must determine whether this creates a potential conflict between the securities laws and the antitrust laws. Since the antitrust laws prohibit commercial bribery and the securities laws prohibit manipulation, the conduct at issue is unlawful under both the securities laws and the antitrust laws; and no "potential conflict" arises.

POINT III

THE FALSE ANALYSTS' REPORTS, PREARRANGED PURCHASES (TIE-INS AND LADDERING), AND SPLITTING OF COMMISSIONS DO NOT FORM ELEMENTS OF A COMMERCIAL BRIBERY CLAIM AND SHOW NO POTENTIAL SPECIFIC CONFLICT WITH THE IPO MARKET

As alleged in the Complaint, Petitioners designed their commercial bribery scheme to manipulate the price of certain securities by the issuance of false analyst reports and by directed purchases. J.A. 53-56, ¶¶ 84-89, 91-106. False analyst reports violate section 9(a)(4) of the Exchange Act and directed purchases violate section 9(a)(2) of the Exchange Act. If they are deemed to be "inextricably intertwined" with the IPO aftermarket, Petitioners will not benefit from this argument because they will be engaged in unlawful conduct.

Sections 9(a)(2) and (4), mandatory statutory provisions, contain no clauses authorizing the SEC to regulate by rule, interpretation, modification, or adaptation. The lack of reference to the SEC in these provisions contrasts sharply with, among others, section 9(a)(6) and section 10(b) of the Exchange Act. Congress explicitly gave the SEC the power to adopt rules, regulations, or interpretations under both these statutes. Under those provisions, Congress required the SEC to prevent manipulation in whatever form it might take. It did not, as Petitioners imply, authorize the SEC to permit manipulation. Sections 9(a)(2) and 9(a)(4) establish a statutory floor below which covered conduct always violates the statute.

Petitioners cannot point to any statutory or regulatory authority, legislative history, or past regulatory activity in which the SEC permits, has permitted, or has the

authority to permit the manipulation of stock prices in the aftermarket in violation of sections 9(a)(2) and (4). In the past, Petitioners have suggested that section 19(a) of the Securities Act provides the SEC with the "authority . . . to make, amend, and rescind *such rules and regulations* as may be necessary . . ." 15 U.S.C. § 77s(a) (emphasis added). The fact that the SEC is free to retract or expand its "rules and regulations" is not surprising, but the provision does not give the SEC authority to make, amend, or rescind the statutory provisions of the Securities Act or the Securities Exchange Act.

As usual, Petitioners have gone too far with their argument. According to the District Court, whose determinations and whose approach to the case have been adopted here by the Petitioners, any contact by the SEC or a self regulatory organization with a particular practice or provision of the securities laws makes it automatically immune from the antitrust laws. *See, e.g.*, Pet'rs Br. 3-15.

Transactions involving large amounts of stock in the IPO aftermarket but no investment purpose are manipulative devices intended to create a false impression of interest in the stock. The legislative history of the Exchange Act makes it abundantly clear that manipulation is *per se* unlawful while stabilization is subject to SEC regulation. The House Report introducing the Exchange Act states:

> But wash sales and matched orders *and other devices designed to create a misleading appearance of activity* with a view to enticing the unwary into the market on the hope of quick gains *are definitely prohibited. False and misleading statements* designed to induce investors to buy when they should sell and to sell when they should buy *are also outlawed and penalized.*

* * * *

> The evidence as to the value of *pegging and stabilizing* operations, particularly in relation to new issues, is far from conclusive. While abuses are undoubtedly associated with such manipulation, *because of the desire of the Committee to proceed cautiously such operations have not been forbidden altogether, but have been subjected to control as the administrative commission may find necessary* . . . .

(H.R. Rep. No. 1383, 73d Cong., 2d Sess. 10-11 (1934), reprinted in 5 J. S. Ellenberger & E. P. Mahar, Legislative History of the Securities Act of 1933 and Securities Exchange Act of 1934, Item 18 (1973).)

Congress declared manipulation of aftermarket trading of securities unlawful by adopting sections 9(a)(2), 9(a)(4), and 17(a) of the Securities Act. As the language of these provisions makes clear, Congress passed them to prohibit aftermarket manipulation, not to regulate it, or to grant rule making power over it. Sections 9(a)(2), 9(a)(4), and 17(a) declare manipulation *per se* unlawful and are not subject to delicate construction or interpretation by the SEC. The SEC cannot promulgate rules or regulations that would countenance manipulation of the aftermarket when Congressional statutes outlaw it. In its landmark opinion in *Ernst & Ernst v. Hochfelder*, this Court said:

> The rulemaking power granted to an administrative agency charged with the administration of a federal statute is not the power to make law. Rather, it is the power to adopt regulations to carry into effect the will of Congress as expressed by the statute.

425 U.S. 185, 213-14 (1976) (internal citations omitted). *See also Federal Election Comm'n v. Democratic Sen-*

atorial Campaign Comm., 454 U.S. 27, 32 (1981); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Bobker*, 808 F.2d 930, 936 (2d Cir. 1986); *Hayfield N. R.R. Co. v. Chicago & North Western Transp. Co.*, 467 U.S. 622, 634 (1984). Since manipulation of the aftermarket is *per se* illegal under the securities statutes, the SEC can never permit aftermarket manipulation. Pfeiffer's antitrust claim meshes neatly with the securities laws without actual or potential sparks, collisions, "repugnancy," or conflict. *Gordon*, 422 U.S. at 689-90; *NASD*, 422 U.S. at 730-34; *Strobl*, 768 F.2d at 27 (2d Cir. 1985).[5]

Respondents challenge the Petitioners' "right" to manipulate the price of hot issue securities through the use of false statements by analysts, tie-in arrangements, directed purchases, and laddering agreements. This conduct is prohibited by sections 9(a)(2), 9(a)(4) and 17 of the Securities Act. Congress enacted these provisions to prevent manipulation and ensure a fair, unrigged market. Review of Antimanipulation Regulation of Securities Offerings, 56 S.E.C. Docket 1302, 1994 WL 138672, *25-26 (April 19, 2004); *Crane Co. v. Westinghouse Air Brake Co.*, 419 F.2d 787, 794 (2d Cir. 1969) (purpose of

[5] While the SEC actively regulates underwriter compensation, Respondent does not challenge the amount of the commissions that the investment banking Petitioners received. The compensation the investment banking Petitioners received in their capacity as broker for transactions not involving hot issue securities is challenged only as an undisclosed bribe received as payment for the manipulation of the market at the expense of retail customers. Holding the Petitioners' conduct illegal under the antitrust laws would not conflict with or restrict the SEC's ability to: (1) define what constitutes underwriter compensation; (2) set limits on the amount of compensation an underwriter may receive; or (3) devise terms and arrangements for interstate public offerings to the SEC. The application of the Robinson-Patman Act to prevent the bribery of brokerage firms would in no way inhibit the SEC's ability to revise, rewrite, create, expand, or retract its rulings and regulations on underwriter or brokerage compensation.

section 9(a)(2) is to outlaw every device "used to persuade the public that activity in a security is the reflection of a genuine demand instead of a mirage."); *see also* SEC Report on Proposals for Amendments of the Securities Act of 1933 and the Securities Exchange Act of 1934, H.R. Comm. Print, 77th Cong., 1st Sess. 50 (1941); 3 Loss, Securities Regulation 1549-55 (2d ed. 1961); *Ceres Partners v. GEL Assocs.*, 918 F.2d 349, 361 (2d Cir. 1990) (section 9(a)(4) prohibits misrepresentations in manipulative schemes); *Panfil v. ACC Corp.*, 768 F.Supp. 54, 59 (W.D.N.Y. 1991), *aff'd*, 952 F.2d 394 (2d Cir. 1991); H.R. Rep. No. 1383, 73d Cong., 2d Sess. 10-11 (1934), reprinted in 5 J. S. Ellenberger & E. P. Mahar, Legislative History of the Securities Act of 1933 and Securities Exchange Act of 1934, Item 18 (1973); S. Rep. No. 792, 73d Cong., 2d Sess. (1934), reprinted in 5 J.S. Ellenberger & E.P. Mahar, Legislative History, Item 17); *United States v. Naftalin*, 441 U.S. 768, 777 (1979) (section 17(a) "was intended to cover any fraudulent scheme in an offer or sale of securities whether in the course of an initial distribution or in the course of ordinary market trading."); *see also United States v. Brown*, 555 F.2d 336, 338-39 (2d Cir. 1977). *Securities and Exch. Comm'n v. Sayegh*, 906 F.Supp. 939, 946 (S.D.N.Y. 1995); *In re Michael Batterman*, 46 S.E.C. 304, 305 (Nov. 2, 1976);[6] *Securities and Exch. Comm'n v. Halsey, Stuart & Co.*, 30 S.E.C. 106, 112 (1949), *aff'd sub. nom., Securities and Exch. Comm'n v. Militano*, 101 F.3d 685, 1996 WL 282013 (2d Cir. 1996).

Tie-in arrangements, now and historically, violate section 17(a) of the Securities Act and 10(b) of the Exchange Act. *In re Richard D. DeMaio*, Release No.

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[6] Pfeiffer does not dispute that the SEC enforces the securities laws. The SEC's decisions cited here demonstrate its enforcement of the securities laws, not its ability to regulate *per se* unlawful conduct.

ID-37, 54 S.E.C. Docket No. 1509, 1993 WL 300297 (Aug. 4, 1993); *In re R. L. Emacio & Co.*, Release No. 34-4880, 35 S.E.C. 191, 1953 WL 44107 (June 16, 1953); *Securities and Exch. Comm'n v. Wexler*, Release No. 13225, 51 S.E.C. Dkt No. 516, 1992 WL 87808 (Apr. 22, 1992) (violation of sections 5(a) and 17(a) of the Securities Act and sections 10(b) and 15(c) of the Exchange Act); *In re Stuart James Co. Inc.*, [1992-1993 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 85129 at 84,089 (Mar. 17, 1993); *In re Victor Goldman*, Release No. 34-31210, 52 S.E.C. Docket 1551, 1992 WL 252182 (Sept. 22, 1992).

Pre-arranged, directed purchases, or directing the trading in a security is a violation of section 17(a) of the Securities Act and 10(b) of the Exchange Act when the trading falsely suggests to the public that the activity is "the reflection of a genuine demand instead of a mirage." *Securities and Exch. Comm'n v. Kimmes*, 799 F.Supp. 852, 859 (N.D. Ill. 1992), *aff'd sub nom., Securities and Exch. Comm'n v. Quinn*, 997 F.2d 287 (7th Cir. 1993); *United States v. Cohen*, 518 F.2d 727, 734 (2d Cir. 1975); *United States v. Corr*, 543 F.2d 1042, 1045-46 (2d Cir. 1976); *Securities and Exch. Comm'n v. Allison*, Case No. 81-435 (BE), 1982 WL 1560, at *7 (D. Or. Jan. 17, 1982); *In re C. James Padgett*, Release No. 38423, 64 S.E.C. Docket 272, 1997 WL 126716 (March 20, 1997); *Securities and Exch. Comm'n v. Wexler*, Release No. 14489 (Sept. 21, 1995); S.E.C. Release No. 26182 (October 14, 1998), 53 FR 41206.

Laddering also has been expressly declared a violation of the securities laws. *In re Barrett & Co.*, Release No. 2901, 9 S.E.C. 319, 328 (May 22, 1941) (violation of section 9(a)(2) of the Exchange Act); *In re Halsey Stuart & Co.*, Release No. 34-4310, 30 S.E.C. 106, *3,1949 WL 36458 (Sept. 21, 1949); *Securities and Exch.*

Comm'n v. Resch-Cassin & Co., 362 F.Supp. 964, 976-77 (S.D.N.Y. 1973); *In re Charles C. Wright*, Release No. __, 3 S.E.C. 190, 1938 WL 34042 (Feb. 28, 1938), *rev'd and remanded on other grounds*, 112 F.2d 89 (2d Cir. 1940); *In re GOB Shops of America, Inc.*, Release No. 33-4075, 39 S.E.C. 92, 1959 WL 59435 (May 6, 1959); *In re Bruns, Nordeman & Co.*, Release No. 34-6540, 40 S.E.C. 652 (April 26, 1961) (violation of section 17(a) of the Securities Act and sections 10(b) and 15(c) of the Exchange Act.); *see also* Sen. Rep. No. 792, 73rd Cong., 2d Sess., pp. 7-9.

The analysts' recommendations, made directly and indirectly to the class members, were fraudulent and violated long-standing, uniform, judicial applications of section 10(b) because they had no justifiable basis. *In re IBM Corp. Sec. Litig.*, 163 F.3d 102, 107 (2d Cir. 1998) (statements regarding projections of future performance are actionable "if the speaker does not genuinely or reasonably believe them"); *In re Time Warner Inc. Sec. Litig.*, 9 F.3d 259, 266 (2d Cir. 1993); *Virginia Bankshares, Inc. v. Sandberg*, 501 U.S. 1083, 1093 (1991) (opinions such as "fair" and "high" must have a factual basis that justifies them as accurate, and if they have no factual basis, the statements are misleading).

Since Pfeiffer challenges conduct that is *per se* unlawful under federal statutes, the SEC is not, contrary to the District Court's decision, "empowered to regulate the conduct [challenged by Pfeiffer]." *In re Initial Pub. Offering Antitrust Litig.*, 287 F.Supp.2d at 507.

POINT IV

DEFENDANTS ENGAGED IN PRICE MANIPULATION, NOT PRICE STABILIZATION

Section 9(a)(6) gives the SEC broad authority to regulate aftermarket price stabilization, specifically authorizing the "pegging, fixing, or stabilizing of price of such security." In this case, like the authority on the amount of commissions, it has become a logical absurdity. How far into the aftermarket does the period of stabilization extend, six months, nine months, two years? To the end of the period any Petitioner's transactions need to be covered? The same rule applies to the amount of the commission. The amount necessary to meet projected profits for the year? Is a proper commission the amount necessary to pay the investment banking firm the bribe due him in the available time? If the ordinary commission were $.05 per share but the customer paid $1.00 per share, that would be twenty times the ordinary amount on the transaction. Is that within the discretion to set negotiated rates? These abuses of the SEC's discretionary rulemaking powers suggest that this basis for immunity, i.e., conduct is immune if it can be compelled by the SEC or if the Commission can allow it, for example, allow the investment banking firms to violate the law with impunity under a claim of immunity. These determinations cannot be put in the hands of the SEC or the broker under a theory of self-regulation.

When it considered the SEC's ability to permit aftermarket stabilization, the District Court used it as an excuse for not thinking and not recognizing an obvious basis for rejecting immunity:

> Whether actions such as the "laddering" or "tie-in" arrangements alleged by the Sherman Act Plaintiffs are permissible aftermarket stabilization practices is

> not for this Court to determine. It is enough that the Commission is granted the authority to make that determination.

In re Initial Pub. Offering Antitrust Litig., 287 F.Supp.2d at 513.

The District Court determined that the Exchange Act impliedly repealed the antitrust laws because it "grants the Commission sweeping authority to define and prohibit manipulative practices in connection with securities offerings." *Id.* The District Court also relied on 17 C.F.R. § 242.100-05 ("Reg. M") and the Division of Market Regulation Staff Legal Bulletin No. 10, Prohibited Solicitations and "Tie-in" Agreements for Aftermarket Purchases (Aug. 25, 2000) (hereinafter "Bulletin No. 10."). *Id.*, 287 F.Supp.2d at 514-15. Neither Reg. M nor Bulletin No. 10 can compel manipulation or allow it, i.e., repeal the antitrust laws as applied to the aftermarket manipulation alleged in the *Pfeiffer* Complaint. Reg. M specifically states in its preface that it does not govern price manipulation:

> Any transaction or series of transactions, whether or not effected pursuant to the provisions of Regulation M, *remain subject to the antifraud and anti-manipulation provisions of the securities laws*, including, without limitation, Section 17(a) of the Securities Act of 1933 [15 U.S.C. [§] 77q(a)] and Sections 9, 10(b) and 15(c) of the Securities Exchange Act of 1934 [15 U.S.C. [§§] 78i, 78j(b), and 78o(c)].

17 C.F.R. § 242.100(a) (emphasis added). Similarly, Bulletin No. 10 reminds underwriters that tie-in arrangements and laddering:

> may violate the anti-manipulation provision of the Exchange Act, particularly Rule 10b-6 (which was

> replaced by Rules 101 and 102 of Regulation M) under the Exchange Act, and may violate other provisions of the federal securities laws.

Neither Reg. M nor Bulletin No. 10 support the District Court's determination that the SEC can authorize or direct market manipulation. The fact that the SEC is free to add a layer of regulation atop the securities laws prohibiting an activity already declared unlawful by Congress does not create a potential for conflict between the securities laws and the antitrust laws or interfere with a pervasive regulatory scheme.

This Court need not look at SEC rules and regulations to determine whether laddering and tie-in arrangements are permissible stabilization activities. Tie-in agreements and laddering designed to manipulate the price of a security upward are *per se* unlawful under the securities statutes.

Price stabilization is not the same as market manipulation. *See* 17 C.F.R. § 242-100(b) ("*Stabilize* or *stabilizing* means the placing of any bid, or the effecting of any purchase, for the purpose of pegging, fixing, or maintaining the price of a security."); *Stella v. Kaiser*, 82 F.Supp. 301, 308-10 (S.D.N.Y. 1948) (distinguishing between stabilization, which the SEC has jurisdiction to regulate, and manipulation, which is *per se* unlawful); *United States v. Stein*, 456 F.2d 844, 850 (2d Cir. 1972) ("proof of 'creating actual or apparent active trading in' and of 'raising or depressing the price of' " a security is manipulation, not stabilization). According to the *Pfeiffer* Complaint, the truth of which is assumed for the purposes of a motion to dismiss, the Petitioners were not engaged in stabilization because they intended to, and succeeded in, artificially inflating the share price of the hot issue securities, often more than 300% to 400% higher than the initial offering price.

The Petitioners' manipulation cannot be justified under the guise of price stabilization. *Securities and Exch. Comm'n v. Torr*, 22 F.Supp. 602, 608 (S.D.N.Y. 1938) (holding that directed purchases violated section 9(a)(2) and were not stabilization activities regulated by the SEC). As the SEC said in *In re Michael J. Meehan*, Release No. __, 2 S.E.C. 588, 1937 WL 32921 (July 31, 1937):

> It is true that Congress in Section 9(a)(6) permits, subject to such restrictions as the Commission may impose, transactions whose purpose is to peg, fix or stabilize the price of a security. On the propriety generally of pegging, fixing and stabilizing transactions we need not here express a view. But to extend the statutory concept of pegging, fixing and stabilizing, to permit transactions designed to maintain a price that already had been artificially raised, would be to neglect the obvious purpose and intent that underlay Section 9(a)(6) and to make its provisions a means for avoiding the prohibitions of Section 9(a)(2). Instead, such pretended pegging, fixing and stabilizing operations, in order to be properly understood, must be projected on the background of which they are an intrinsic part, and that background is the earlier design of manipulation.

United States v. Brown, 5 F.Supp. 81 (S.D.N.Y. 1933), *aff'd*, 79 F.2d 321 (2d Cir. 1935), *cert. denied*, 296 U.S. 250; *Harper v. Crenshaw*, 82 F.2d 845 (D.C. App. 1936), *cert. denied*, 298 U.S. 685; *In re R. L. Emacio & Co.*, Release No. 34-4880, 35 S.E.C. 191, 1953 WL 44107 (June 16, 1953).

The SEC's jurisdiction and power are limited to its Congressional mandate; and it cannot, even if it desires to, promulgate rules or declare market manipulation lawful when it is *per se* illegal under the securities laws.

Federal Election Comm'n, 454 U.S. at 32; *Bobker*, 808 F.2d at 936; *Hochfelder*, 425 U.S. at 213-14. Congress made market manipulation *per se* unlawful by adopting sections 9(a)(2), 9(a)(4), and 17(a) of the Securities Act. Congress enacted these provisions explicitly to prohibit aftermarket manipulation, and they are not subject to the SEC's qualification or interpretation. *Id.* At the same time that it designed sections 9(a)(2) and (4), statutes without discretion, Congress carefully crafted section 9(a)(6) of the Exchange Act to allow the SEC the necessary discretion to permit or prohibit conduct that could be essential to the capital raising needs of a free market. *See e.g.*, section 9(a)(6) of the Exchange Act; H.R. Rep. No. 73-1383, at 6-7 (1934); S. Rep. No. 73-792, at 5 (1934). In section 9(a)(6), Congress granted the SEC broad discretion to create, modify, limit, or expand the methods and forms of permissible stabilization. *See id.* Unlike manipulation, Congress specifically decided not to prohibit stabilization activities and left it to the SEC to prescribe appropriate rules and regulations. *United States v. Morgan*, 118 F.Supp. 621, 695 (S.D.N.Y. 1953); S. Committee Rep., No. 792, 73d Cong., 2d Sess., pp. 8-9 (April 17, 1934).

POINT V

PETITIONERS' ARGUMENTS HAVE NO MERIT

Arguing in favor of the broadest possible immunity for anything that involves or relates to a public offering (Pet'rs Br. 25-31), Petitioners, contrary to the brief of the United States (United States' Amicus Br. 16-23) and the existing case law (*see, generally, National Gerimed.*, 425 U.S. at 392), claim the equivalent of an express repeal or blanket immunity for the IPO market. If Petitioners succeed in establishing their catch-all definition

of implied repeal they would be able to find implied immunity for everything even remotely touching the securities laws, regardless of whether any potential conflict exists. This has never been the intent of Congress or this Court. United States' Amicus Br. 10, 16-23.

In determining the pervasiveness of the "regulatory" scheme, Petitioners continually confuse regulatory provisions and regulatory power with enforcement provisions and enforcement power. Working with a regulatory provision, the SEC can change the manner in which it is construed as it did with the fixed commission provisions. *See Gordon*, 422 U.S. at 668-82. An enforcement provision provides no such flexibility or expansiveness.

From a policy viewpoint, the approach suggested by the Solicitor General's brief, allowing unlawful transactions "inextricably intertwined" with lawful activities is a bad idea. Looking for cover for a new, imaginative plan of wrongdoing in the next hot issue IPO market, Petitioners will find easy protection for their next unlawful scheme. Pet. App. 13a-14a, 15a.

Petitioners' attitude toward this appeal, their conduct that lead to the filing of hundreds of lawsuits, and their realization of hundreds of millions, if not billions, of dollars in unlawful profits is simple. They wish to keep everything, suffer no penalty, and leave the law in a state that imposes no risks to them for similar misconduct in the future. The manner in which they treat the law makes this clear. Petitioners make the same erroneous argument adopted by the District Court: they treat everything having to do with the IPO process as if it were sacred and covered by a pervasive system of regulation, an argument rejected by the Court of Appeals and by the Solicitor General in his amicus brief. United States' Amicus Br. 10.

To find immunity a party must make a specific factual inquiry into the allegations necessary for a Robinson-Patman Act commercial bribery claim. *Friedman v. Salomon/Smith Barney, Inc.*, 313 F.3d 796, 799 (2d Cir. 2002); *Northeastern Tel. Co. v. American Tel. and Tel. Co.*, 651 F.2d 76, 83 (2d Cir. 1981). Petitioners have made no effort to identify regulatory action that would conflict with any element of a claim for commercial bribery under the Robinson-Patman Act. They merely rail against the possibility that an antitrust suit could proceed on the basis of their bad conduct in a public offering.

Petitioners argue that "by requiring an overt statement of legislative intent on the very conduct at issue" the Second Circuit has reduced "the implied immunity doctrine to a dead letter." Pet's Pet. Cert. 13. This Court has long required the "potential specific conflict" to be "clear" or the intent to be "clear." *United States v. Borden Co.*, 308 U.S. 188, 198 (1939) ("The intention of the legislature to repeal 'must be *clear* and manifest.' " (quoting *Red Rock v. Henry*, 106 U.S. 596, 601, 602 (1883)(emphasis supplied)); *see also Otter Tail Power Co. v. United States*, 410 U.S. 366, 372 (1973); *National Gerimedical Hosp. & Gerentology Ctr. v. Blue Cross*, 452 U.S. 378, 389 (1980) ("this intent [to repeal] must be clear"); *NASD*, 422 U.S. at 719-20; *Gordon v. New York Stock Exch., Inc.*, 422 U.S. 659, 682 (1975); *Pasadas v. National City Bank*, 296 U.S. 497, 503 (1936); *Borden*, 308 U.S. at 198; *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 154 (1976). The criteria listed by the Second Circuit (Cert. Pet. 33a-34a, 57a.), are not as rigid as Petitioners contend; all require or permit qualitative assessment, not rigid assertion.

An implied repeal most often rests on a determination that the SEC may allow the conduct that is prohibited by plaintiff's antitrust claim. *See In re Stock Exch. Options Trading Antitrust Litig.*, 317 F.3d 134, 149 (2d Cir. 2003); *Friedman*, 313 F.3d at 800-01; *In re Public Offering Fee Antitrust Litig.*, No. 98 Civ. 7890, 2003 WL 21496795 at *2 (S.D.N.Y. June 27, 2003). Petitioners have made no effort to show that this standard immunity provision can be met here. In fact, they cannot meet it. As we show in our memorandum, the conduct at issue here is unlawful by statute and may not be made lawful by rule, regulation, interpretation, or otherwise. Petitioners have ignored this long-standing principle.

A complex regulatory scheme and a finding under the regulatory statute that a particular transaction was "in the public interest" or served competition has not always been a basis for finding immunity or for precluding the application of the antitrust laws to the transaction. *See Otter Tail*, 410 U.S. at 372-73; *Philadelphia Nat'l Bank*, 374 U.S. at 351-52; *California v. Federal Power Comm'n*, 369 U.S. 482, 488-89 (1962); *United States v. Radio Corp. of America*, 358 U.S. 334, 346-52 (1959); *Silver v. New York Stock Exch.*, 373 U.S. at 360-63 (1963).Petitioners treat treble damage antitrust suits as if they were, at minimum, the handy work of the devil. *Id.* at 3, 4. Nevertheless, Petitioners note the hopeless inability of the SEC to deal with "tie-in" transactions and "laddering" transactions in the hot issue IPO markets in 1963, 1984, and 1999. Pet'rs Br. 12-13. Having shown a high degree of recidivism in the misconduct that characterized their actions in this hot issue IPO market, Petitioners have demonstrated that they deserve and that the IPO markets in the United States would benefit from the availability of treble damage suits.

Repeal of the antitrust laws should be implied only when necessary to make the securities laws work and "even then only to the minimum extent necessary." *National Gerimedical*, 452 U.S. at 388; *Silver*, 373 U.S. at 357; *Strobl*, 768 F.2d at 26. The Court's analysis "must focus on the 'potential' for '*conflicts* between the antitrust laws and a[n authorized] regulatory scheme.' " *Stock Exchs. Options*, 317 F.3d at 148 (emphasis and alteration in original); *Strobl*, 768 F.2d at 27. Petitioners violated both the securities laws and the Robinson-Patman Act with equal malfeasance. Because the conduct at issue is impermissible under both, the application of the antitrust laws does not conflict with the securities laws, and it does not interfere with any regulatory scheme, i.e., the SEC could never create a regulatory framework or engage in rule making that would allow Petitioners' conduct.

In the mountain of papers submitted in support of the petition for certiorari by interested organizations, numerous parties complained that the decision of the Second Circuit was incomprehensible and would be impossible to apply to day to day life. Cert. Pet. 19. If anything, the decision by the Court of Appeals clarified the confused and confusing law in the area of antitrust immunity and the national securities markets' regulatory scheme more than any other decision by any other court. The best response to the argument of confusion and incomprehensibility is, "Hire better lawyers."

CONCLUSION

As we have shown in this brief, the substantive elements of a claim of commercial bribery that violates the Robinson-Patman Act, § 13(c), do not intrude on the regulatory scheme of the federal securities laws for either the national securities markets as a whole or the IPO market, nor do they present a "potential conflict." Therefore, we respectfully request that the Court affirm the decision of the United States Court of Appeals for the Second Circuit and remand the case for further proceedings consistent with its opinion. Should the Court feel that any of the allegations contained in the *Pfeiffer* Complaint, e.g., allocations of large blocks in IPOs, tie-ins or laddering in the aftermarket, use of excessive commissions to divide profits, somehow are indispensable to a commercial bribery claim and intrude on the national securities markets or on the regulatory scheme that governs them, we respectfully request that the Court remand with leave to cure those defects by service of an amended complaint.

Respectfully submitted,

RUSSEL H. BEATIE
BEATIE AND OSBORN LLP
521 Fifth Avenue, 34th Floor
New York, New York 10175
(212) 888-9000

Attorneys for Respondent
Milton Pfeiffer

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CREDIT SUISSE SECURITIES (USA) LLC, ET AL.,

Petitioners,

v.

GLEN BILLING, ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

REPLY BRIEF FOR PETITIONERS

ROBERT B. MCCAW
LOUIS R. COHEN
ALI M. STOEPPELWERTH
FRASER L. HUNTER, JR.
NOAH A. LEVINE
WILMER CUTLER PICKERING
HALE & DORR LLP
399 Park Avenue
New York, New York 10022
(212) 230-8800
Attorneys for Petitioner Citigroup Global Markets Inc.

STEPHEN M. SHAPIRO
Counsel of Record
KENNETH S. GELLER
TIMOTHY S. BISHOP
JOHN P. SCHMITZ
MAYER, BROWN, ROWE & MAW LLP
1909 K Street, N.W.
Washington, D.C. 20006
(202) 263-3000
Attorneys for Petitioner Merrill Lynch, Pierce, Fenner & Smith Incorporated

Counsel for Petitioners
[Additional Counsel Listed On Signature Page]

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This Court's precedents in the securities context demonstrate that immunity from the antitrust laws must be implied whenever an agency, acting pursuant to a specific grant of congressional authority, actively regulates the conduct at issue (*Gordon*, 422 U.S. at 688-689), or the regulatory scheme governing that conduct is so "pervasive" that Congress must be assumed to have "intended to lift the ban of the Sherman Act" from the challenged activities. *NASD*, 422 U.S. at 733. In both situations, there must also be a showing of "plain repugnancy" between the antitrust laws and the regulatory regime. *Gordon*, 422 U.S. at 682. This Court confirmed the importance of this doctrine in *Trinko*—which would have been a "good candidate" for implied immunity were it not for an antitrust savings clause—explaining that the benefits of antitrust litigation are "slight" when a "regulatory structure [is] designed to deter and remedy anticompetitive harm." The costs, by contrast, are substantial, because the risk of "false condemnations" inevitably "chill[s]" beneficial conduct permitted by regulators and "distort[s] investment." 540 U.S. at 406, 412, 414. This immunity standard is satisfied here. The conduct plaintiffs allege—agreements inferred from communications between underwriters and potential purchasers of newly issued securities—is subject to active and pervasive SEC regulation that takes competition into account. And the threat of treble damages liability would displace nuanced SEC regulation, deterring conduct that the SEC deems important to capital formation.

The United States has proposed a new test for immunity different from the one articulated by this Court—whether conduct is "explicitly or implicitly" permitted by the securities laws or is "inextricably intertwined" with such conduct—but agrees that the Second Circuit's decision cannot stand. Amicus briefs filed by the NASD, NYSE, and organizations representing underwriters and securities issuers attest to the danger that plaintiffs' claims pose to the scheme of regulation that has fostered the Nation's capital markets. Nothing

plaintiffs or their amici say refutes our showing that the Second Circuit erred and that immunity should be implied here so that "competition" does not "become paramount to the great purposes of the Exchange Act" (S. REP. NO. 94-75, at 14), which as applied by the SEC "anchor[s]" public policy in the field of securities regulation. *Dabit*, 126 S. Ct. at 1509.

I. IMMUNITY SHOULD BE IMPLIED UNDER *GORDON* AND *NASD* TO PERMIT THE SEC TO PERFORM ITS REGULATORY TASK.

Plaintiffs' primary argument against immunity (Billing Br. 12-22) is that there can be no "plain repugnancy" from application of the antitrust laws because, even though most of the conduct challenged is permitted and even encouraged by the SEC, the alleged tie-ins and excessive commissions are prohibited under the securities laws. That assertion turns on a misunderstanding of the public offering process and its regulation, as well as of this Court's immunity precedents.

A. Carefully Calibrated SEC And NASD Standards Governing Book-Building Communications And Commissions Would Be Destroyed If Antitrust Suits Like These Could Be Maintained.

Capital formation depends not only on selling shares, but also on their performance in the aftermarket, because investors purchase in anticipation of what will happen next. Communications between syndicate underwriters and potential IPO purchasers with respect to the purchasers' intentions in the aftermarket are therefore "essential" to capital formation. Pet. App. 223a; see Pet. Br. 3-5. As the SEC recognizes, such conversations—about intentions to hold shares acquired in the IPO, possible future purchases of the stock at particular prices, and investors' anticipated positions—enable underwriters to determine the price and size of the offering that is likely to raise the most money for the issuer without undue risk of a falling price in the aftermarket. Pet. App. 224a-227a. Only if the price is stable or increases in the aftermarket will the offering be successful for the issuer *and* the IPO allo-

cants. When IPO allocants "flip" shares the aftermarket may be destabilized and stock prices go down—a "serious problem" that "preclude[s] the success of the financing" and threatens the underwriters' ability to sell future IPOs. SEC Release No. 34-2446, at 4 (Mar. 18, 1940); *Friedman*, 313 F.3d at 801.

These conversations among competitors and with customers, touching on prices and quantities in potential future transactions, might be problematic under the antitrust laws, and they need to be closely governed in the public offering process as well—but by an expert agency that has regard not only to competition concerns but also to the needs of markets and investors. Congress charged the SEC with setting limits on such conversations that balance goals of capital formation, investor protection, and competition. There is no question that the SEC has carried out this mandate. See Pet. App. 129a-139a; Pet. Br. 8-15. The SEC's pervasive regulatory scheme encompasses all aspects of the IPO process, communications with purchasers, and commission arrangements, and protects the aftermarket from manipulative effects. Pursuant to that scheme the SEC and NASD actively regulate "the very conduct alleged in this action." Pet. App. 110a.

For decades the SEC has addressed tie-in agreements during "hot markets," issuing detailed studies and reports, proposed rules, and staff bulletins and bringing enforcement actions against underwriters alleging "conduct very similar, if not identical, to that alleged" here. Pet. App. 110a, 118a; J.A. 63. In its most detailed pronouncement on book-building communications to date, the SEC issued guidance instructing that underwriters may make inquiries designed to identify prospective customers who are interested in holding their IPO shares and adding to their position in the stock and may determine the "prices at which the customer might accumulate that position," but may not "induce aftermarket bids or purchases." Pet. App. 224a-225a. The determination whether a communication has "cross[ed] the line" to become an

unlawful inducement to purchase stock in the aftermarket, the SEC has stated, "depends on the particular facts and circumstances surrounding" the communication. *Id.* at 225a. Applying the SEC's standards, the United States acknowledges, "present[s] close and difficult questions." U.S. Br. 20.

Similarly, successful offerings also depend in part on the relationships between underwriters and their customers. The SEC accordingly permits underwriters to allocate IPO securities to their best customers, taking into account the total compensation the customer pays to the underwriters. See Pet. Br. 4-5. Whether compensation paid to defendants was "excessive" under NASD rules and unlawfully induced by syndicate members, or instead reflects a legitimate payment based upon a customer's recognition of valuable services, depends on fine lines embodied in regulatory standards. See NASD Rule 2440; NASD IM-2440(b). Seemingly generous commissions are often permissible because under SEC and NASD regulations customers may pay not only for a particular execution but also for a wide range of services rendered over time, including IPO allocations. *Ibid.*; Pet. App. 106a-107a. Only careful application of these detailed standards to the circumstances of a particular payment can reveal whether it was permissible. For instance, in the *Invemed* case an NASD panel—after hearing 17 expert witnesses, reviewing thousands of pages of evidence, and conducting a three-week trial—held that large commissions paid by a handful of customers to one brokerage firm were lawful. *Invemed* vividly illustrates the subtle inquiry that is necessary.

Antitrust adjudication would substantially interfere with the SEC's careful regulation of these matters. Judges and juries lacking expertise in the nature of underwritings and applying antitrust law's "competition first" policies would strike different balances than expert SEC regulators and reach different results as to whether particular conversations or commission payments were unlawful. Antitrust courts would also decide whether unreasonable compensation was

in fact paid or a tie-in purchase made. For millions of transactions stemming from 900 separate IPOs, the jury would have to make these judgments using antitrust standards differing fundamentally from those applied by the SEC and NASD. The threat of antitrust verdicts would necessarily alter underwriter conduct during the IPO process, deterring behavior that the SEC promotes. Accordingly, it is not enough for plaintiffs to characterize conduct, from the ex post perspective of their complaint, as "clearly unlawful." The threat of treble damages verdicts would distort underwriters' behavior in ways inconsistent with the SEC's objectives.

The danger of conflict is magnified because plaintiffs would necessarily ask the antitrust court to draw inferences that impermissible tie-ins occurred from circumstantial evidence. For example, underwriters typically make concise notations of customer responses to permissible book-building inquiries, which might read "buyer up to 45" or "needs 40,000 shares to get started." Plaintiffs would urge an antitrust jury to find, based on such ambiguous evidence, that underwriters crossed the line into prohibited conduct. And, they would undoubtedly try to prove a conspiracy by showing that a number of syndicate members crossed the line into prohibited conduct. Antitrust courts would not decide such questions by applying the carefully crafted standards the SEC has developed for distinguishing between permissible and impermissible conversations—they would instead consider the conduct through an antitrust lens that looks skeptically at conversations among competitors and discussions of future prices. There is an overwhelming likelihood that an antitrust court would decide the issue differently than the SEC. These practical realities—not plaintiffs' characterizations of conduct as unlawful—are decisive in evaluating the risk of conflict under *NASD* and *Gordon*. Pet. App. 156a, 191a.

If antitrust courts were allowed to make such judgments and mete out treble damages in class actions, antitrust concerns would become "the predominant considerations" in un-

derwriting and market participants would be discouraged from engaging in book-building practices that the SEC recognizes "serve the interests of the markets and the capital formation process." Pet. App. 193a-194a; see *id.* at 196a-197a (the "*in terrorem* effect" of antitrust litigation would "distort market participant behavior" in ways "harmful" to the securities markets). As a practical matter, trial lawyers and juries would draw the lines defining permissible conduct. See Pfeiffer Br. 26 ("[t]hese determinations cannot be put in the hands of the SEC"). The detailed distinctions drawn by the SEC would become meaningless, thwarting the SEC's "ability to interpret, apply, and revise the governing law" in light of developing facts or knowledge. Pet. App. 194a. In such an uncertain environment underwriters would be less likely to risk their capital by underwriting offerings.[1]

B. Allegations That Defendants Engaged In Conduct Unlawful Under The Securities Laws Are No Bar To Implied Immunity.

Plaintiffs' contention (Billing Br. 19-20) that the conduct they allege cannot be immune because they label it as unlawful is also refuted by this Court's precedents. Those decisions make clear that the immunity inquiry focuses not on plaintiffs' characterizations or on whether all of the challenged conduct is currently permitted under the securities laws, but rather on whether application of the antitrust laws creates an

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[1] Plaintiffs contend (Billing Br. 16) that tie-ins are barred outright by Securities Act § 17(a) and Exchange Act § 9(a) and § 15(c). But those prohibitions are not self-defining. Congress gave the SEC authority to "define" fraudulent and manipulative practices. Pet. App. 132a; 15 U.S.C. § 78o(c)(2)(D). It also conferred discretion on the SEC to grant exemptions "even with respect to statutory prohibitions and requirements." Pet. App. 149a; see 15 U.S.C. §§ 77z-3, 78mm. There is no doubt that the SEC has the power to determine whether conduct crossed the line between permissible book-building and manipulation in accordance with the standards set forth in its 2005 guidance. Pet. App. 216a-233a.

actual or potential conflict with the SEC's authority over the activities at issue so that implied immunity is necessary to make the regulatory scheme work as Congress intended. See *NASD*, 422 U.S. at 734; *Gordon*, 422 U.S. at 691 (immunizing fixed commission rates despite their prohibition by the SEC, because interposition of the antitrust laws would conflict with Congress's determination to leave supervision of this conduct to the SEC).

Thus in *NASD*, the Court held that its conclusion that horizontal agreements to foreclose a secondary market were immune had "equal force" *after* the SEC, which previously condoned the agreements, changed course and decided to eliminate barriers to competition in the secondary market, announcing that it would "take action with respect to the very conduct at issue," including "direct regulatory action" under Section 22(f). 422 U.S. at 734; SEC Br. in *NASD*, at 22-23; see U.S. Reply Br. in *NASD*, at 10 (the SEC had "ruled that impediments to a secondary brokerage market are inconsistent with the general objectives of the securities laws"). The alleged illegal conduct in *Trinko*, which would have been a "good candidate" for antitrust immunity absent a savings clause, resulted in Verizon entering into a consent decree and paying substantial compensation. 540 U.S. at 403-404, 406.

Contrary to plaintiffs' argument (Billing Br. 42-43), this Court has repeatedly found immunity despite claims of illegality under administrative law. *E.g.*, *Brown*, 518 U.S. at 238, 252-254 (implying immunity where the propriety of defendants' actions under the labor laws turned on satisfying "carefully circumscribed conditions" and, the dissent made clear, defendants' conduct was of questionable legality); *Hughes Tool* v. *TWA*, 409 U.S. 363, 383, 386 (1973) (implying immunity even though Hughes' corporate control of air carrier was "unacceptable" and "faulty" under CAB regulations); *Pan Am.*, 371 U.S. at 310-313 (dismissing antitrust challenge to an arrangement condemned by the CAB where the issues presented in the complaint were entrusted to the

CAB and the "two regimes" of antitrust and aeronautical law "might collide"); *U.S. Navigation Co.* v. *Cunard S.S. Co.*, 284 U.S. 474, 485 (1932) (charges of Shipping Act violations "supersede[d] the anti-trust laws"); SIFMA Br. 15-25. As in *Gordon* and *NASD*, these decisions turned on the threat of conflict to the regulatory regime posed by application of the antitrust laws, not on whether all the specific conduct at issue was authorized under that regime. And they leave no doubt that the immunity doctrine may not be evaded simply by labeling the actions at issue as "clearly unlawful."

NASD, *Gordon*, and *Trinko* recognize that when an expert agency effectively regulates a complex subject such as bookbuilding, an overlay of private treble damages litigation threatens redundancy, distorted investment, and disruption of administrative policy. Given the adequacy of administrative supervision and private actions under the securities laws, there is no practical or legal justification for plaintiffs' campaign to convert ordinary securities claims into antitrust claims.

II. THE UNITED STATES' PROPOSED IMMUNITY TEST IS CONTRARY TO *GORDON* AND *NASD*, BUT NONETHELESS REQUIRES DISMISSAL OF THESE SUITS WITH PREJUDICE.

The United States, in a brief signed by the SEC, Antitrust Division, and FTC, agrees with much of our legal analysis. Contradicting plaintiffs' principal argument, the government states that because implied immunity serves "the imperative need to avoid conflict with the securities regulatory regime" it is not "limited to conduct that is expressly or implicitly authorized under the securities laws." U.S. Br. 12, 25. What matters for immunity "is not whether a regulatory violation has been alleged" but whether an antitrust challenge "could interfere with the regulatory scheme." *Id.* at 12-13, 24. The United States thus agrees that implied immunity extends to conduct "not * * * specifically approved by the SEC" because an antitrust suit aimed at activities "'directly related to

the SEC's responsibilities poses a substantial danger'" that market participants could be subjected to "'duplicative and inconsistent standards.'" *Id.* at 13 (quoting *NASD*). In all these observations the United States properly focuses on the scope and nature of the regulator's responsibilities.

The Solicitor General nevertheless proposes a different test: that implied immunity extends only to conduct that is permitted under the securities laws or conduct "ancillary to," "inextricably intertwined with," or that "cannot practicably be separated from" permitted activities. U.S. Br. 12-13. That novel test misperceives this Court's precedents and fails to protect the regulatory scheme—the very purpose of implied immunity. In any event, it is readily satisfied here and would require dismissal of both complaints with prejudice.

A. The Solicitor General's "Inextricably Intertwined" Test Is Not The Implied Immunity Standard This Court Has Announced.

The Solicitor General's "inextricably intertwined" test—a compromise between opposing positions of the SEC and DOJ (U.S. Br. 5 n.3)—is not the implied immunity standard this Court announced in *Gordon* and *NASD* and confirmed in *Trinko*. That new test (never adopted by any court or advocated by any agency) would make immunity turn on the relationship between challenged conduct and practices that are "authorized." But this Court has made clear that the relevant connection is between challenged "activities" and the SEC's regulatory "responsibilities"—an inquiry designed to ensure that the SEC can "carry out [those] responsibilit[ies] free from the disruption of conflicting judgments that might be voiced by courts exercising jurisdiction under the antitrust laws." *NASD*, 422 U.S. at 734-735. This focus on the expert agency's responsibilities is especially important where, as here, Congress charged the agency with "perform[ing] the antitrust function" (a statutory requirement nowhere acknowledged in the Solicitor General's brief). *Trinko*, 540 U.S. at 412; see *NASD*, 422 U.S. at 732-733; Pet. Br. 9-10.

As a practical matter, the novel standard proposed by the United States would not prevent the repugnancy between the antitrust laws and the securities regulatory regime that the implied immunity doctrine is designed to avoid. Even the horizontal conspiracy to suppress competition in the secondary mutual fund market, held immune in *NASD* because it was "directly related" to SEC "responsibilities" within a "pervasive regulatory scheme," would not have been immune under the government's test because the SEC had brought "competition into the secondary market" and disapproved the challenged restraints. 422 U.S. at 734-735. As the NASD has emphasized, by "plac[ing] undue emphasis on whether particular actions are explicitly authorized by the securities laws," the government's test "limits the range of market activities" in which industry participants are likely to engage "to those authorized in unambiguous terms" and "compels [underwriters] to forgo other—legal—activities for fear that a court might find that an action was not authorized by those laws." NASD Br. 22. This standard thus "conflicts with Congress's intention to use broad grants of regulatory authority to foster innovative efforts by market participants and regulators to develop capital and promote competition." *Ibid.*

In addition, the key concepts in the government's test—whether conduct is "ancillary" to and "inextricably intertwined" with "expressly or implicitly authorized" activities—are abstract and ambiguous and fail to provide the practical guidance that this Court has recognized is vital to securities market participants. *Blue Chip Stamps*, 421 U.S. at 742-743. The government's standard would undermine the purposes of the implied immunity doctrine by fostering extensive litigation over the meaning of these terms and encouraging artful pleading by plaintiffs seeking to avoid an immunity defense. See NASD Br. 23; SIFMA Br. 3 (under the United States' vague standard, plaintiffs could potentially "plead around an immunity defense and thereby gain discovery and possible class certification," destroying the very purpose of immunity). The reaction of market participants would almost cer-

tainly be avoidance of any conduct—even if the SEC does not currently prohibit it and believes it serves beneficial purposes (such as the restrictions on flipping upheld in *Friedman*, 313 F.3d 796)—that has not specifically been blessed by the SEC or NASD.[2]

As we have shown (Pet. Br. 23-34), immunity must be implied here under *NASD* and *Gordon* because the IPO process (including the IPO aftermarket) is subject to a pervasive scheme of SEC regulation, the SEC has actively exercised its authority over all of the challenged conduct, and the requisite repugnancy exists. This Court should not abandon the clear-cut legal standards laid down in those decisions, which have governed implied immunity for 30 years with no sign—prior to the Second Circuit's decision—that they are difficult for courts to apply or for regulators and industry members to comprehend.[3]

B. Defendants' Alleged Conduct Is Immune Under An "Inextricably Intertwined" Standard.

The Solicitor General's novel test is contrary to established law and should not be adopted, but in any event is met

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[2] The *Noerr-Pennington* and commercial speech doctrines cited by the Solicitor General in support of his novel test are inapposite. They have nothing to do with accommodating antitrust law to a detailed regulatory scheme entrusted by Congress to an expert agency that performs the antitrust function and that makes nuanced judgments concerning complex, fast-changing markets.

[3] Application of *NASD* to this case could not impair government enforcement prerogatives. *NASD* was a government enforcement proceeding and it established legal rules that have applied to such cases for the last 30 years. Thus, this Court need not address whether finding immunity here would "oust" government antitrust enforcement. U.S. Br. 22. Moreover, the concerns expressed by the SEC to the lower courts focused on private treble damages actions, not government enforcement actions. This Court recognizes the substantial differences between the two. *Square D Co.* v. *Niagara Frontier Tariff Bur.*, 476 U.S. 409, 421-422 & n.28 (1986).

in this case. It requires reinstatement of the district court's order dismissing the complaints with prejudice.

1. All the conduct alleged in plaintiffs' complaints is permitted by the securities laws or "inextricably intertwined" with permitted conduct. The United States acknowledges that Congress knew of syndicated underwriting when it adopted the securities laws and "chose regulation rather than prohibition," with the result that "[c]ollaborative activity in the formation and operation of an underwriting syndicate [must] be deemed immune." U.S. Br. 12. The United States recognizes that authorized syndicate activities include "book-building," during which underwriters "discuss price and demand with * * * potential investors" to aid them in the "difficult task" of determining the "'quantity and pricing'" of the offering and "'how to allocate the IPO shares to purchasers.'" *Ibid.*

According to the United States, defendants are immune from plaintiffs' "vague and conclusory allegations" that they required customers to pay excessive commissions and make tie-in purchases if that conduct "is so closely related to approved collaboration in the course of underwriting an IPO that it cannot, as a practical matter, be readily distinguished and separately proved without impermissibly chilling permitted conduct." U.S. Br. 20-21, 24. That close relationship is established, we have explained (*supra*, Part I.A), because SEC and NASD rules draw fine lines between permissible and impermissible conduct of both types that would be obliterated by antitrust litigation. It is clear too from the fact that all of the specific allegations upon which plaintiffs rely to establish the concerted-action element of their Sherman Act claim describe conduct permitted by the SEC. J.A. 27-31, Billing Compl. ¶¶ 44-64. Indeed, plaintiffs admit that the "prohibited agreement was made and implemented" through "otherwise permitted syndicate conduct." Billing Br. 24. The complaints conclusively show—not just "strongly suggest"—that the alleged "conspiracy is no more than an inference that respondents have drawn from protected collaboration." U.S.

Br. 27. Imposing "antitrust liability (or even allowing the unleashing of costly discovery) on the basis of [such] inferences" would discourage permissible book-building, creating a "direct conflict with the regulatory scheme." *Id.* at 15.

2. The government suggests (at 21) that immunity should not extend to "an express horizontal agreement to restrict competition through [unlawful IPO] practices" that is reached "outside the scope of the collaboration in underwriting and promoting a particular IPO." As the government observes, however (at 23-24), all of plaintiffs' specific allegations seeking to establish a conspiracy describe behavior permitted by the SEC. Although plaintiffs contend that conspiracy may be inferred from non-syndicate conduct (Billing Br. 32-34), they offer only conclusory assertions that defendants discussed the operation and effect of tie-ins and monitored underwriter and customer compliance across multiple underwritings. Even if properly pleaded, such claims are subject to dismissal because they challenge joint conduct that is closely connected with the syndicated underwriting process and that plaintiffs concede is well within the scope of SEC and SRO regulation of IPOs. See Billing Br. 18 (Exchange Act legislative history shows the Act was directed at concerted manipulation by "pools"); *NASD*, 422 U.S. at 730-735 (holding immune an overarching conspiracy among NASD members over which the SEC had "broad regulatory authority"); 15 U.S.C. § 78i(a)(6); Pet. Br. 8-9.

3. Dismissal is required under the ordinary notice pleading standards of Rule 8. Implied immunity is a "legal question" that arises from the face of plaintiffs' complaints. *Gordon*, 422 U.S. at 688; Pet. App. 76a-77a. The SEC's detailed demonstration that immunity is necessary was part of the record in the district court. *Gordon*, 422 U.S. at 685; 5B WRIGHT & MILLER, FEDERAL PRACTICE & PROCEDURE § 1357, at 376 (3d ed. 2004). As in *NASD*, the immunity issue is appropriately resolved at the earliest stages of the litigation. 422 U.S. at 734-35.

The United States suggests that to the extent the complaints are "ambiguous" as to whether plaintiffs' antitrust claims "rely on authorized conduct," plaintiffs should be given the opportunity to replead. U.S. Br. at 27-28. There is no ambiguity. Stripped of allegations of permitted conduct the complaints fail to allege an antitrust conspiracy. Even if plaintiffs could plead a conspiracy without relying on inferences from authorized conduct, antitrust courts still could not practicably separate alleged tie-ins and excessive commissions from conduct permitted by the SEC and NASD. *Supra*, Part I.A. And although the Billing plaintiffs now say (at 10) that they are challenging only "abuses" of conduct permitted by the SEC, allowing an antitrust court to determine what is an "abuse" of an authorized practice would risk the very conflicting judgments that immunity is designed to prevent.

Because it is clear that plaintiffs' claims cannot be saved from implied immunity by repleading, reinstatement of the district court's order dismissing the complaints with prejudice is the proper disposition. In addition, plaintiffs chose to stand on their complaints after the district court rendered its decision. Rather than seek leave to amend, they took appeals based on the complaints at issue. Plaintiffs have thereby waived any right to replead. Pet. Br. 49 n.6 (citing authority); *NASD*, 422 U.S. at 697, 374 F. Supp. at 114 (affirming dismissal with prejudice after clarifying the antitrust immunity standard); *Hochfelder*, 425 U.S. at 215 (declining to remand because throughout the "lengthy history" of the case plaintiffs rested on the theory the Court found legally insufficient).

III. PLAINTIFFS OFFER NO OTHER BASIS FOR DENYING IMMUNITY.

Plaintiffs place great weight on this Court's statements that implied immunity is "not favored" and that antitrust law should be reconciled, not "ousted." Billing Br. 13. But the same decisions recognize that immunity *must* be implied when there is "clear repugnancy" and immunity is "necessary to make the [regulatory scheme] work." *Silver*, 373 U.S. at

357; *NASD*, 422 U.S. at 719-720. For some conduct, "[t]here can be no reconciliation of [the SEC's] authority" with antitrust liability. *NASD*, 422 U.S. at 729. *Gordon* and *NASD* make clear that implied immunity extends beyond conduct that is permitted by the SEC. To avoid conflict with the SEC's regulatory responsibilities, immunity also encompasses conduct that may or may not be permitted by the agency depending on the circumstances and prohibited conduct regulated under evolving administrative standards. *Gordon*, 422 U.S. at 676, 685-689; *NASD*, 422 U.S. at 729-730, 735. All the conduct alleged by plaintiffs falls within these categories. Neither plaintiffs nor their amici have explained why immunity should not be implied in these circumstances.

A. The Second Circuit's Implied Immunity Test Is Inconsistent With *NASD* And *Gordon* And Does Not Provide Certainty Or Predictability.

Plaintiffs defend the Second Circuit's implied immunity test (Billing Br. 13), but it "fails to provide adequate protection" for the securities regulatory scheme. U.S. Br. 23. The Second Circuit treated the "pervasive regulation" prong of immunity as "vague," disfavored, and limited to SRO activities. Pet. App. 50a. But in fact it was applied by this Court in *NASD* to confer immunity on a horizontal conspiracy involving private parties, and the Court relied on SEC regulation far less pervasive than the SEC's oversight of public offerings and commissions. 422 U.S. at 733-735. The Second Circuit assumed that the SEC permitted those industry-wide horizontal restraints when in fact the SEC had criticized them and threatened enforcement actions. *Ibid.*; SEC Br. in *NASD*, at 22-23; U.S. Reply Br. in *NASD*, at 6, 10.

The court of appeals would find immunity based on potential conflict only if "Congress contemplated the specific conduct and intended for the antitrust laws to be repealed"—judged in light of a hodgepodge of fact-intensive considerations—which largely obliterates the distinction between im-

plied and express immunity. Pet. App. 57a; see 1A AREEDA & HOVENKAMP, ANTITRUST LAW ¶ 243d, at 319. Moreover, the court failed to understand that the SEC has to make fine-line judgments in the areas of conduct at issue and that its discretion to define and remedy manipulation while promoting capital formation would be infringed if antitrust courts and juries could make their own judgments under rule of reason principles. In short, the Second Circuit misunderstood this Court's precedents and failed to appreciate the practical regulatory needs that the immunity doctrine is designed to serve.

That the Second Circuit said its five criteria are non-exclusive and flexible in application makes them less, not more, compatible with precedent and good sense. Its multi-factor analysis promises only confusion and uncertainty in an area where "certainty and predictability" are necessary to promote capital formation. *Central Bank*, 511 U.S. at 188; see *Dirks* v. *SEC*, 463 U.S. 646, 658 & n.17 (1983) (criticizing "imprecise" rules, which have an "inhibiting influence" on market participants). As in *Trinko*, application of the antitrust laws would result in overdeterrence and regulatory disruption. 540 U.S. at 414.

B. Defendants Are Not Seeking "Blanket Immunity" From The Antitrust Laws For The Securities Industry.

Plaintiffs, their amici, and the United States assert that if these complaints were entitled to immunity under the "pervasive regulation" prong as well as the "active regulation" prong of implied immunity, as defendants contend, the antitrust laws would be entirely "ousted" from application to the securities industry. Billing Br. 21; N.Y. Br. 12; U.S. Br. 16. That assertion is meritless.

As defendants have consistently recognized, immunity under the "pervasive regulation" standard is appropriate only when the challenged activities are subject to a pervasive regulatory scheme *and* application of the antitrust laws to

that conduct would conflict with and be "plainly repugnant" to the operation of the scheme. *Gordon*, 422 U.S. at 682; *NASD*, 422 U.S. at 719. Accordingly, this Court's determination in *NASD* that Congress's "investiture of such pervasive supervisory authority in the SEC" over the horizontal agreements at issue rendered them immune did not remove all NASD member or mutual fund conduct from antitrust scrutiny. 422 U.S. at 733. For example, defendants agree with the United States that a decision granting immunity here would not prevent an antitrust challenge to a naked agreement among underwriters to allocate exclusive territories for the placement of new brokerage offices. U.S. Br. 20. In this case, however, both the pervasive regulation and repugnancy showings have been made, entitling defendants to immunity.

C. Defendants Are Entitled To Immunity From Pfeiffer's Commercial Bribery Claims.

Pfeiffer contends (at 7, 10) that his complaint, unlike *Billing*, focuses on activity in the aftermarket. Pfeiffer alleges that underwriters allocated IPO securities to institutional defendants on the condition that they "purchase additional large quantities of the security in the aftermarket," pay large commissions on open market trades, and comply with other "restrictive conditions" in the aftermarket. J.A. 52, 54-56; see Pet. App. 18a-19a. But the *Billing* complaint makes the very same allegations: to inflate "aftermarket prices" defendants required customers "in order to obtain IPO shares" to buy a class security "in the aftermarket" and to pay "non-competitively determined commissions" on open market trades. J.A. 13. Though dressed up differently, both claims are the "same." Pet. App. 75a, 128a n.1. Merely labeling the commission payments as "commercial bribes" does nothing to change the implied immunity analysis.

The aftermarket demands, alleged in both cases to have been tied directly to IPO allocations, were actively and pervasively regulated. Under the Exchange Act, the SEC enjoys "plenary" authority to regulate "aftermarket trading" (Pet.

App. 132a), as Pfeiffer's brief confirms (at 19-25). And here the SEC and NASD brought enforcement actions directed at both aftermarket laddering and commission payments. Pet. Br. 14-15. The *Invemed* case—in which an NASD panel held payments of exactly the type Pfeiffer characterizes as bribes to be lawful—illustrates the fact-intensive inquiry necessary to determine whether a particular commission is permissible or not under regulatory standards. *Supra*, p. 4. This Court's decisions thus require implied immunity from Pfeiffer's claims as surely as from Billing's. The generalized standards of Section 2(c) of the Robinson-Patman Act (Pfeiffer Br. 15-18), like Section 1 of the Sherman Act, virtually guarantee that antitrust courts and juries awarding treble damages will reach decisions contrary to those made by expert regulators.[4]

D. Denying Immunity Would Harm United States Capital Markets And Undermine Congress's Securities Litigation Reforms.

Plaintiffs oppose immunity to maximize their damage claims. Pfeiffer Br. 11. But investors are pursuing 300 suits under the securities laws based on the same allegations. And under the Sarbanes-Oxley Act, the SEC may earmark amounts recovered in enforcement actions "for the benefit of the victims." 15 U.S.C. § 7246(a). As in *Trinko*, antitrust suits would just add "a new layer of interminable litigation atop the variety of litigation routes" already pursued. 540 U.S. at 414; see also LOUIS L. JAFFE, JUDICIAL CONTROL OF

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[4] Pfeiffer's allegations that research analysts inflated prices do not escape immunity. The SEC has plenary authority to regulate analyst reports (15 U.S.C. § 78j(b)) and actively responded to allegations that "favorable research" was used to market investment banking services. SEC Release No. 34-46301 (Aug. 2, 2002). The SEC and SROs have engaged in rulemaking (*ibid.*; 17 C.F.R. §§ 242.501(a), 242.502(a); NASD Rule 2711; NYSE Rule 472) and enforcement directed at such allegations. SEC Litig. Release No. 18438, *Federal Court Approves Global Research Analyst Settlement* (Oct. 31, 2003).

ADMINISTRATIVE ACTION 151 (1965) (criticizing the "dogmatic assumption" that "the premises of antitrust are presumptively more in the public interest than those underlying the regulatory statutes").

Plaintiffs point to lower court antitrust rulings in the securities field as evidence of the beneficial application of the antitrust laws, but they are easily distinguishable. Billing Br. 44-48. In none of those cases did the SEC urge the necessity of immunity. In the vast majority the defendants did not raise an immunity defense. And many predate the modern development of implied immunity doctrine. As this Court has emphasized, each immunity claim must be analyzed in light of the particular industry, regulatory scheme, and conduct involved. *Gordon*, 422 U.S. at 663.

The United States acknowledges the concern, voiced by the SEC below, that the risk of "treble damages awards by federal juries applying the antitrust laws will unduly disrupt the capital formation process." U.S. Br. 21; Pet. App. 193a-194a. The United States explained in its brief in *Tellabs* v. *Makor Issues*, No. 06-484, at 22, that "[i]f a securities case is not dismissed at the pleading stage, the practical reality is that the defendant will usually be forced to settle." That is especially true in antitrust class actions demanding treble damages. IPO participants will avoid conduct that an antitrust jury may label as anticompetitive rather than risk blackmail settlements, with the result that antitrust concerns will override the SEC's scheme of regulation. Pet. App. 194a.

Plaintiffs deny the relevance of Congress's efforts to reform securities litigation to prevent such blackmail settlements. But given Congress's consistent attempts to end "abuses of the class-action vehicle" in the securities field (*Dabit*, 126 S. Ct. at 1510-1511), it is entirely appropriate to apply the implied immunity doctrine to dismiss securities claims like these dressed in antitrust clothing. Permitting such a pleading tactic "is hardly a result that Congress would have mandated." *NASD*, 422 U.S. at 735. The incongruities

between private antitrust and securities litigation are a "legitimate" part of the repugnance inquiry. U.S. Br. 21.

Costly and burdensome securities litigation—defying Congress's efforts to curtail it—is a significant factor in driving stock offerings to overseas and private equity markets. SCHUMER & BLOOMBERG, SUSTAINING NEW YORK'S AND THE US' GLOBAL FINANCIAL SERVICES LEADERSHIP i-ii, 10, 16-17, 101 (Dec. 2006); INTERIM REPORT OF THE COMMITTEE ON CAPITAL MARKETS REGULATION ix-x, 29-34, 46 (Nov. 30, 2006). Because virtually any syndicate conduct that could be pleaded as manipulation or deception under the securities laws could also be pleaded as an antitrust violation warranting treble damages, denying immunity in these cases would accelerate that harmful trend. Pet. Br. 41; SIFMA Br. 27-28. It would encourage vexatious litigation designed to secure multi-million (or billion) dollar settlements, which would cause issuers to look elsewhere to raise capital, chill syndicate underwriting, and deter underwriters from conducting the book-building that the SEC says is "necessary to the offering process." U.S. Br. 25-26; Pet. App. 127a, 157a, 193a-194a. A surer recipe for disruption of "this crucial segment of the economy" is hard to imagine. Pet. App. 157a.

CONCLUSION

The judgment of the court of appeals should be reversed and the district court's judgment dismissing the complaints with prejudice should be reinstated.

Respectfully submitted.

ROBERT B. MCCAW
LOUIS R. COHEN
ALI M. STOEPPELWERTH
FRASER L. HUNTER, JR.
NOAH A. LEVINE
WILMER CUTLER PICKERING
HALE & DORR LLP
399 Park Avenue
New York, New York 10022
(212) 230-8800
Attorneys for Petitioner Citigroup Global Markets Inc.

ANDREW J. FRACKMAN
TIMOTHY J. MURIS
RICHARD G. PARKER
BRENDAN DOWD
O'MELVENY & MYERS LLP
Seven Times Square
New York, New York 10036
(212) 326-2000
Attorneys for Petitioner Robertson Stephens, Inc.

CARTER G. PHILLIPS
A. ROBERT PIETRZAK
JOEL M. MITNICK
SIDLEY AUSTIN LLP
787 Seventh Avenue
New York, New York 10019
(212) 839-5300
Attorneys for Petitioner Deutsche Bank Securities Inc.

STEPHEN M. SHAPIRO
Counsel of Record
KENNETH S. GELLER
TIMOTHY S. BISHOP
JOHN P. SCHMITZ
MAYER, BROWN, ROWE &
MAW LLP
1909 K Street, N.W.
Washington, D.C. 20006
(202) 263-3000
Attorneys for Petitioner Merrill Lynch, Pierce, Fenner & Smith Incorporated

ANDREW B. CLUBOK
BRANT W. BISHOP
BRADLEY J. BONDI
KIRKLAND & ELLIS LLP
655 15th Street, N.W.
Washington, D.C. 20005
(202) 879-5000
Attorneys for Petitioner Morgan Stanley & Co. Inc.

SHEPARD GOLDFEIN
PREETA D. BANSAL
JAMES A. KEYTE
SKADDEN, ARPS, SLATE,
MEAGHER & FLOM LLP
Four Times Square
New York, New York 10036
(212) 735-3000
Attorneys for Petitioner Janus Capital Management LLC

RICHARD A. CIRILLO
KAREN R. KOWALSKI
KING & SPALDING LLP
1185 Avenue of the Americas
New York, New York 10036
(212) 556-2100
Attorneys for Petitioner
Credit Suisse Securities (USA) LLC

MOSES SILVERMAN
PHILIP G. BARBER
PAUL, WEISS, RIFKIND,
WHARTON & GARRISON LLP
1285 Avenue of the Americas
New York, New York 10019
(212) 373-3000
Attorneys for Petitioner
Lehman Brothers Inc.

JON R. ROELLKE
JEFFREY H. DRICHTA
CLIFFORD CHANCE US LLP
2001 K Street, N.W.
Washington, D.C. 20006-1001
(202) 912-5000
Attorneys for Petitioner
Merrill Lynch, Pierce,
Fenner & Smith Incorporated

PAUL GONSON
GLENN R. REICHARDT
KIRKPATRICK & LOCKHART
PRESTON GATES ELLIS LLP
1601 K Street, N.W.
Washington, D.C. 20006
(202) 778-9000
Attorneys for Petitioner
Merrill Lynch, Pierce,
Fenner & Smith Incorporated

GANDOLFO V. DIBLASI
PENNY SHANE
DAVID M.J. REIN
RICHARD J.L. LOMUSCIO
SULLIVAN & CROMWELL
LLP
125 Broad Street
New York, New York 10004
(212) 558-4000
Attorneys for Petitioners
The Goldman Sachs Group,
Inc. and Goldman, Sachs &
Co.

RANDY M. MASTRO
JOHN A. HERFORT
RICHARD FALEK
GIBSON, DUNN &
CRUTCHER LLP
200 Park Avenue
New York, New York 10166
(212) 351-4000
Attorneys for Petitioner
Bear, Stearns & Co., Inc.

STEVEN WOLOWITZ
MATTHEW INGBER
MAYER, BROWN, ROWE &
MAW LLP
1675 Broadway
New York, New York 10019
(212) 506-2500
Attorneys for Petitioner
Comerica, Inc.

GERALD J. FIELDS
KEVIN C. LOGUE
PAUL HASTINGS JANOFSKY
& WALKER LLP
75 East 55th Street
New York, New York 10022
(212) 318-6000
Attorneys for Petitioners
Van Wagoner Capital
Management, Inc. and Van
Wagoner Funds, Inc.

DAVID W. ICHEL
JAYMA M. MEYER
SIMPSON THACHER &
BARTLETT LLP
425 Lexington Avenue
New York, New York 10017
(212) 455-2000
Attorneys for Petitioners
J.P. Morgan Securities Inc.

JOHN D. DONOVAN, JR.
ROBERT G. JONES
ROPES & GRAY LLP
One International Place
Boston, Mass. 02110
(617) 951-7000
Attorneys for Petitioners
Fidelity Distributors Corp.,
Fidelity Brokerage Services
LLC, and Fidelity
Investments Institutional
Services Co., Inc.

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In the Supreme Court of the United States

CREDIT SUISSE FIRST BOSTON LTD., ET AL.,

Petitioners,

v.

GLEN BILLING, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

SUPPLEMENTAL BRIEF FOR PETITIONERS

ROBERT B. MCCAW
LOUIS R. COHEN
ALI M. STOEPPELWERTH
FRASER L. HUNTER, JR.
NOAH A. LEVINE
WILMER CUTLER PICKERING
HALE & DORR LLP
399 Park Avenue
New York, New York 10022
(212) 230-8800
Attorneys for Petitioner
Citigroup Global Markets Inc.

STEPHEN M. SHAPIRO
Counsel of Record
KENNETH S. GELLER
TIMOTHY S. BISHOP
MAYER, BROWN, ROWE & MAW LLP
1909 K Street, N.W.
Washington, D.C. 20006
(202) 263-3000
Attorneys for Petitioner
Merrill Lynch, Pierce, Fenner & Smith Incorporated

Counsel for Petitioners
[Additional Counsel Listed On Signature Page]

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SUPPLEMENTAL BRIEF FOR PETITIONERS

Petitioners submit this supplemental brief pursuant to Rule 15.8 to call the Court's attention to an article written by SEC Commissioner Paul Atkins, published after petitioners filed their reply briefs. In that article, which is reproduced in an addendum to this brief, Commissioner Atkins stated that "[t]he Supreme Court needs to resolve the issue of antitrust immunity" presented in this case in order to "tur[n] back" a "serious threat to our capital markets." Paul Atkins, *A Serious Threat to Our Capital Markets*, WALL STREET JOURNAL, June 10, 2006, at A12.

Specifically addressing this case, Commissioner Atkins explained that plaintiffs' "legal gambit" of seeking "to trump the securities laws with the antitrust laws" evades the limitations that Congress adopted in the Private Securities Litigation Reform Act of 1995 "to rein in terribly costly, frivolous class action lawsuits" brought under the securities laws. Permitting antitrust suits—which "yiel[d] treble damages, compared to the single damages available under the securities laws"—to be brought against underwriters for alleged conduct during public offerings that are closely regulated by the SEC and NASD "could devastate America's process of capital formation" and "accelerate the marginalization of our capital markets." Absent this Court's review, Commissioner Atkins warned, "[c]lass action suits based in antitrust law could be used to dismantle the system that has been developed over the years for getting IPOs efficiently and effectively to the market." Indeed, "[l]itigation risks" have already substantially "lessen[ed] the international appetite for our capital markets." Non-U.S. companies offering new stock have gone from raising "nine of every 10 dollars" in United States markets in 2000 to only one out of every 10 dollars raised last year.

Reiterating points made by the SEC in both courts below (see Pet. App. 124a-158a, 180a-198a), Commissioner Atkins cautioned that

> [s]yndicate underwriting of public offerings *inherently* involves agreements and joint actions among potential competitors, including agreements about price; but the underwriting process is extensively regulated by the SEC as well as by the NASD under SEC supervision. The practices in question [in this case] are governed by regulations crafted through a public process of notice-and-comment, with an appreciation for the effects on both capital formation and competition. An awkward antitrust overlay could disable the resulting finely tuned regulatory framework. For this reason, the SEC supported the underwriters' calls for dismissal of the suit on the basis of antitrust immunity.

(Emphasis original).

Implied immunity from private antitrust class actions does not mean, Commissioner Atkins emphasized, that underwriters can "act with abandon or collusion." "The SEC keeps vigilant watch over the IPO marketplace" and, along with "the NASD, can take action to prevent and punish abusive practices." It has done so "in cases dealing with the very practices at issue in *Billing*." In all these circumstances, "[t]he principles that [this Court] laid out in" *Verizon* v. *Trinko* "are directly on point": "when a detailed regulatory scheme exists, antitrust intervention offers only slight benefits and high potential costs."

In urging that this Court's review is necessary now, "[f]or the sake of stability in our capital markets," Commissioner Atkins observed that the "risks involved make *Billing* itself difficult to try rather than settle" and that review of the implied immunity issue will effectively be "barred" in the future if it is denied in this case. Accordingly, Commissioner

Atkins stated, this "Court needs to resolve the issue of anti-trust immunity before the plaintiffs' bar can wield its new weapon to strike a blow to the American capital markets."

CONCLUSION

For the reasons identified by SEC Commissioner Atkins, and those set forth in the petition for certiorari and reply briefs, the petition should be granted.

Respectfully submitted.

ROBERT B. MCCAW
LOUIS R. COHEN
ALI M. STOEPPELWERTH
FRASER L. HUNTER, JR.
NOAH A. LEVINE
WILMER CUTLER PICKERING
HALE & DORR LLP
399 Park Avenue
New York, New York 10022
(212) 230-8800
Attorneys for Petitioner Citigroup Global Markets Inc.

ANDREW J. FRACKMAN
RICHARD G. PARKER
BRENDAN DOWD
O'MELVENY & MYERS LLP
Seven Times Square
New York, New York 10036
(212) 326-2000
Attorneys for Petitioner Robertson Stephens, Inc.

A. ROBERT PIETRZAK
JOEL M. MITNICK
SIDLEY AUSTIN LLP
787 Seventh Avenue
New York, New York 10019
(212) 839-5300
Attorneys for Petitioner Deutsche Bank Securities Inc.

STEPHEN M. SHAPIRO
Counsel of Record
KENNETH S. GELLER
TIMOTHY S. BISHOP
MAYER, BROWN, ROWE & MAW LLP
1909 K Street, N.W.
Washington, D.C. 20006
(202) 263-3000
Attorneys for Petitioner Merrill Lynch, Pierce, Fenner & Smith Incorporated

ANDREW B. CLUBOK
RICHARD A. CORDRAY
BRANT W. BISHOP
KIRKLAND & ELLIS LLP
655 15th Street, N.W.
Washington, D.C. 20005
(202) 879-5000
Attorneys for Petitioner Morgan Stanley & Co. Inc.

SHEPARD GOLDFEIN
JAMES A. KEYTE
SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP
Four Times Square
New York, New York 10036
(212) 735-3000
Attorneys for Petitioner Janus Capital Management LLC

RICHARD A. CIRILLO
KAREN R. KOWALSKI
KING & SPALDING LLP
1185 Avenue of the Americas
New York, New York 10036
(212) 556-2100
Attorneys for Petitioner Credit Suisse First Boston LLC

MOSES SILVERMAN
PHILIP G. BARBER
PAUL, WEISS, RIFKIND, WHARTON & GARRISON LLP
1285 Avenue of the Americas
New York, New York 10019
(212) 373-3000
Attorneys for Petitioner Lehman Brothers Inc.

JON R. ROELLKE
JEFFREY H. DRICHTA
CLIFFORD CHANCE US LLP
2001 K Street, N.W.
Washington, D.C. 20006-1001
(202) 912-5000
Attorneys for Petitioner Merrill Lynch, Pierce, Fenner & Smith Incorporated

PAUL GONSON
GLENN R. REICHARDT
KIRKPATRICK & LOCKHART NICHOLSON GRAHAM LLP
1601 K Street, N.W.
Washington, D.C. 20006
(202) 778-9000
Attorneys for Petitioner Merrill Lynch, Pierce, Fenner & Smith Incorporated

GANDOLFO V. DIBLASI
PENNY SHANE
DAVID M.J. REIN
RICHARD J.L. LOMUSCIO
SULLIVAN & CROMWELL LLP
125 Broad Street
New York, New York 10004
(212) 558-4000
Attorneys for Petitioners The Goldman Sachs Group, Inc. and Goldman, Sachs & Co.

RANDY M. MASTRO
JOHN A. HERFORT
RICHARD FALEK
GIBSON, DUNN & CRUTCHER LLP
200 Park Avenue
New York, New York 10166
(212) 351-4000
Attorneys for Petitioner Bear, Stearns & Co., Inc.

STEVEN WOLOWITZ
MATTHEW INGBER
MAYER, BROWN, ROWE & MAW LLP
1675 Broadway
New York, New York 10019
(212) 506-2500
Attorneys for Petitioner Comerica, Inc.

GERALD J. FIELDS
KEVIN C. LOGUE
PAUL HASTINGS JANOFSKY
& WALKER LLP
75 East 55th Street
New York, New York 10022
(212) 318-6000
Attorneys for Petitioners Van Wagoner Capital Management, Inc. and Van Wagoner Funds, Inc.

JOHN D. DONOVAN, JR.
ROBERT G. JONES
ROPES & GRAY LLP
One International Place
Boston, Massachusetts 02110
(617) 951-7000
Attorneys for Petitioners Fidelity Distributors Corp., Fidelity Brokerage Services LLC, and Fidelity Investments Institutional Services Co., Inc.

JUNE 2006

ADDENDUM

[Wall Street Journal, June 10, 2006, Page A12]

A Serious Threat to Our Capital Markets

By Paul Atkins

In 2000, nine of every 10 dollars raised by non-U.S. companies through new stock offerings were raised in the U.S. Last year the reverse was true: nine of every 10 dollars were raised abroad. Many fear that these figures indicate that the U.S. has lost its position as center of the world's capital markets. Litigation risks and burdensome regulations, including out-of-control paperwork and accounting requirements under Section 404 of the Sarbanes-Oxley Act, lessen the international appetite for our capital markets. To help combat this negative image, the Securities and Exchange Commission has pledged to take steps to address the Section 404 regulatory overload. We have to leave fixing the overall litigation environment to Congress and the courts.

A serious threat to the capital markets, however, looms in the form of a class action lawsuit that is now at the doorstep of the Supreme Court. This suit seeks to trump the securities laws with the antitrust laws. At risk are the cautious reforms that Congress painfully passed in 1995 to try and rein in terribly costly, frivolous class action lawsuits. If this legal gambit is not turned back, it could devastate America's process of capital formation, wreak unprecedented havoc on the underwriting business, and accelerate the marginalization of our capital markets.

The lawsuit is *Billing v. Credit Suisse First Boston, et al.* The *et al.* among the defendants is virtually the entire investment banking industry.

Billing alleges violations arising from the underwriters' efforts while taking public hundreds of technology companies in the late 1990s. The plaintiffs bought stock primarily in the IPO aftermarket; they blame the losses that they suf-

fered when the technology bubble burst in 2000 on the underwriters' allegedly anticompetitive practices in marketing the IPOs.

If securities claims can be restructured as antitrust claims, as the plaintiffs seek to do in this case and other similar ones, Congress's clear intent to block abusive suits will once again be thwarted. Syndicate underwriting of public offerings *inherently* involves agreements and joint actions among potential competitors, including agreements about price; but the underwriting process is extensively regulated by the SEC as well as by the NASD under SEC supervision. The practices in question are governed by regulations crafted through a public process of notice-and-comment, with an appreciation for the effects on both capital formation and competition. An awkward antitrust overlay could disable the resulting finely tuned regulatory framework. For this reason, the SEC supported the underwriters' calls for dismissal of the suit on the basis of antitrust immunity.

By asserting that underwriters should be immune from antitrust challenges by the plaintiffs' bar, the SEC was not suggesting that underwriters are entitled to act with abandon or collusion. The SEC keeps vigilant watch over the IPO marketplace. We and the NASD can take action to prevent and punish abusive practices among securities dealers in the marketplace. Indeed, we have done so in the past, most notably in the 1990s, when the SEC attacked collusion in pricing in the over-the-counter marketplace; and we are continuing to do so in cases dealing with the very practices at issue in *Billing*.

The federal district court decided that there was antitrust immunity and dismissed the case, but the Second Circuit Court of Appeals reversed the decision. Now the Supreme Court is being asked to take up the question. For the sake of stability in our capital markets, I hope that it will do so. The principles that the Supreme Court laid out in its recent *Veri-*

zon v. Trinko decision are directly on point. In that case, the Supreme Court explained that, when a detailed regulatory scheme exists, antitrust intervention offers only slight benefits and high potential costs.

But if the decision of the Court of Appeals is permitted to stand, the reverberations will be widespread. Class action suits based in antitrust law could be used to dismantle the system that has been developed over the years for getting IPOs efficiently and effectively to the market. And as a practical matter, if the Supreme Court declines to hear the appeal, it may well be deciding the future of this and all cases like it.

The risks involved make *Billing* itself difficult to try rather than settle. Moreover, the kind of preemptive appeal that the defendants are making is barred once the Supreme Court has ruled that a particular kind of case can be taken to trial. The stakes are especially high here because antitrust liability yields treble damages, compared to the single damages available under the securities laws. The Supreme Court needs to resolve the issue of antitrust immunity before the plaintiffs' bar can wield its new weapon to strike a blow to the American capital markets, which already are suffering under the weight of new regulatory burdens.

Mr. Atkins is a commissioner of the SEC.

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No. 05-1157

IN THE

Supreme Court of the United States

CREDIT SUISSE FIRST BOSTON LTD., *et al.*,

Petitioners,

v.

GLEN BILLING, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BILLING PLAINTIFFS' SUPPLEMENTAL BRIEF

CHRISTOPHER LOVELL
Counsel of Record
VICTOR E. STEWART
RYAN E. LONG
LOVELL STEWART
HALEBIAN LLP
500 Fifth Avenue
New York, NY 10110
(212) 608-1900

(*Additional Counsel Listed on Signature Page*)

201754

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

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Assuming *arguendo* that Petitioners' Supplemental Brief ("Pet. Supp.") properly responds to supplemental authority under this Court's Rule 15.8,[1] such submission vividly illustrates further reasons why certiorari should be denied.

Prefatorily, the Commentary is not a statement by the Securities and Exchange Commission ("SEC"). Indeed, the Commentary offers as its main reason for certiorari an argument that the SEC has expressly recognized was **not** at issue in the briefing and decisions below. *See* I *infra*.

I. THE COMMENTARY'S MAIN ARGUMENT FOR IMPLIED IMMUNITY WAS NEITHER RAISED NOR CONSIDERED IN THE COURT BELOW

Petitioners and the Commentary offer a new argument for implied immunity that was neither raised by Petitioners nor considered by any of the Courts below: the remedies provided by the federal securities laws to investors are supposedly the exclusive remedies available to investors or are otherwise indicative of a Congressional intent to immunize conduct from antitrust prosecution. *E.g.*, Pet. Supp. at p. 1 (quoting the Commentary's statement that the antitrust claim here "evades the limitations that Congress adopted . . . 'to rein in terribly costly frivolous class action lawsuits brought under the federal securities laws'").

However, in responding to the request of one of the Courts below for its positions, the SEC itself expressly recognized that the exclusive remedy argument for implied immunity had not been raised and was not before the Court.

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1. The "commentary" by Paul Atkins, *A Serious Threat To Our Capital Markets*, Wall Street Journal, June 10, 2006, at A 12 ("Commentary"), is clearly neither a Court decision nor new legislation, however, it may arguably be an "intervening matter".

See Memorandum Amicus Curiae of the Securities Exchange Commission, Submitted at the Request of the [District] Court, p. 27, n. 8 ("Defendants do not challenge this aspect of *Strobl*, and consequently, the Commission does not here express any views on the correctness of the single remedy rule. *Cf. Olmstead v. Pruco Life Insurance Company of New Jersey*, 283 F.3d 429, 435 n. 5 (2d Cir. 2002) (court will ordinarily not consider an argument raised only by an amicus.)"). Because this ground for implied antitrust immunity was neither raised nor considered in the Courts below (*e.g.*, Decision *passim*), it clearly is an improper ground for certiorari. *See Ohio Forestry Ass'n, Inc. v. Sierra Club*, 523 U.S. 726, 738 (1998) (refusing to consider an argument raised for the first time in the Supreme Court).

II. THE ANTITRUST CLAIMS HERE ARE NOT "NEW" AND CONGRESS EXPRESSLY PRESERVED "RIGHTS AND REMEDIES" SUCH AS THESE

One likely reason why Petitioners did not raise the exclusive remedy argument in support of their implied immunity motion below is revealed by the errors in the Commentary's following ahistorical statement: this "Court needs to resolve the issue of antitrust immunity before the plaintiffs' bar can wield its **new** weapon to strike a blow to the American capital markets". Pet. Supp. p. 3. (emphasis supplied).

Far from constituting a "new" weapon against capital markets, the antitrust claim here is merely a continuation of more than one hundred years of previous restraint of trade and antitrust prosecutions promoting the health of "American capital markets". *See* Billing Plaintiffs' Brief in Opposition at p. 24 (collecting citations to common law restraint of trade and Sherman Antitrust Act prosecutions of agreements to

inflate stock prices, underwriters' agreements to inflate their charges, and other collusive agreements by underwriters).[2]

These highly-publicized antitrust prosecutions have resulted in billions of dollars in savings to investors and furthered the enlightened self-interest of Petitioners themselves. *Id.* at pp. 26-28 (collecting statistics and authorities).

In enacting and amending the federal securities laws for seventy-plus years, Congress has (with one exception for certified class actions arising under state law) retained one constant:

> the rights and remedies provided . . . shall be in addition to any and all other rights and remedies that may exist at law or in equity.

Securities Act of 1933 Section 16 (a), 15 U.S.C. § 77p(a); *see also* Securities Exchange Act of 1934 Section 78(a), 15 U.S.C. § 78bb(a)(similar savings clause).

Congressional intent to preserve investors' rights *per force* includes investors' well-established, highly-publicized rights and remedies under the federal antitrust laws. Thus, Congress' savings clause contraindicates any implied Congressional intent to extirpate such rights or remedies.

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2. *See, e.g., In Re Nasdaq Marketmakers Antitrust Litigation*, 187 FRD 466 (S.D.N.Y. 1998); *United States v. Alex Brown & Sons, Inc.*, 963 F. Supp. 235 (S.D.N.Y. 1997); *United States v. Steinhardt Management Co. & Caxton Corp.*, 1995 WL 10627 (DOJ Notice, January 13, 1995); *Three Crown Ltd. Partnership v. Solomon Brothers, Inc.*, 1995 WL 422467 (S.D.N.Y. July 14, 1995); *United States v. Morgan*, 118 F. Supp. 621 (S.D.N.Y. 1953); *Livermore v. Bushnell*, 12 N.Y. Sup. Ct. (5 Hun) 285 (1885). *See also* Appendix 206A fn 6 (collecting various previous instances in which parallel prosecutions of the federal antirust laws and the federal securities laws have been made in response to the same conduct).

In sum, in the forgoing circumstances, the Commentary's main reason for granting certiorari (a) was not raised below, (b) was recognized by the SEC, in its amicus brief, not to have been raised below, (c) provides no basis to challenge the Decision, and (d) further illustrates that certiorari is inappropriate in this case.

III. THE PETITIONERS' MISCHARACTERIZATION OF THE ANTITRUST CLAIMS HERE ILLUSTRATES THE PAST, PRESENT AND FUTURE HARMONY OF THE ANTITRUST AND SECURITIES LAWS WITH RESPECT TO THE CHALLENGED CONDUCT

Because the "epic" conspiracy challenged here is statutorily prohibited by both the antitrust and securities laws, this case presents a situation of conceded past, present and foreseeable future harmony between the antitrust and regulatory statutes. Billing Plaintiffs' Brief in Opposition at pp. 2-3, 11-16. Such harmony cannot be misconstrued as the plain repugnancy required for implied immunity. *Id.* pp. 2-3.

However, the Commentary and the Petitioners mischaracterize the claim here as an attack on the underwriters' ability to agree to set the IPO price. Pet. Supp. p.2. But such activity is not challenged by the claim here (and is permitted by the federal securities laws). Billing Plaintiffs' Brief in Opposition at pp. 11-14.

Instead, plaintiffs allege that defendants conspired to inflate their charges and inflate **aftermarket prices above** the IPO price. *Id.* Such collusive conduct clearly violates the federal antitrust laws. *Id.* fn 8, pp. 12-13.

Moreover, such conduct has always been statutorily prohibited by the "heart" of the Securities Exchange Act, Section 9(a)(2), 15 U.S.C. Section 78i(a)(2) (prohibiting joint action "to raise" prices); *see* Billing Plaintiffs' Brief in Opposition at pp. 15-16 (quoting SEC interpretations of Section 9(a)2 as the "heart" of the Securities Exchange Act); App. p. 12a (Decision notes that Section 9(a)(2) was originally enacted precisely in order to prohibit "pools" of brokers and others from combining to inflate aftermarket stock prices).

Once the Petitioners' and the Commentary's mischaracterization of plaintiffs' claim is corrected, the absence of any grounds for certiorari is again vividly illustrated.

IV. IGNORING THE ABSENCE OF ANY NEW ANTITRUST CLAIMS AGAINST UNDERWRITERS AND THE SECOND CIRCUIT'S REPEATED DECISIONS GRANTING ANTITRUST IMMUNITY TO UNDERWRITERS, THE COMMENTARY ERRONEOUSLY PREDICTS THAT THE DECISION WILL LEAD TO NEW ANTITRUST CLAIMS AGAINST UNDERWRITERS

In order to manufacture a non-existent urgency for certiorari, Petitioners ignore important Second Circuit precedent and the fact that four-fifths of Petitioners' pending motion to dismiss has not yet been decided.

Freed from such constraints, Petitioners and the Commentary predict that "stability in our capital markets" will be threatened by numerous new antitrust claims if certiorari is not granted. Pet. Supp. p. 2.

This prediction is belied by the fact that the Second Circuit Court of Appeals has **granted** implied antitrust immunity to these same underwriters in connection with syndicate underwritings[3] and in the context of collusive exchange action even where the SEC and DOJ had successfully concluded parallel prosecutions.[4]

The truth is that each case turns on its own facts. The critical factual difference between this case and the foregoing Second Circuit decisions granting implied antirust immunity is as follows. Here, the federal antitrust laws and the federal securities laws both have prohibited, since their inception, the challenged conduct. Billing Plaintiffs' Brief in Opposition at pp. 13-18. In contrast, in *Friedman* and *Exchange Options* the challenged conduct, at one time or another, had been permitted under the federal securities laws.

This key factual difference also distinguishes this case from this Court's prior rulings granting antitrust immunity. Billing Plaintiffs' Brief in Opposition at pp. 16-17 (collecting cases). Thus, after the Decision, no Judge of the Second Circuit Court of Appeals voted for re-hearing *en banc* and Respondents were not even asked to file a brief. Appendix at 123a.

Contrary to the Commentary's prediction, what will happen in the future is as follows. Generally, on a case by case basis, courts will examine the facts, as they always have and as the Decision painstakingly did, to see whether this Court's clearly articulated immunity standard has been satisfied. Moreover, during the five-plus years since this case

3. *Friedman v. Solomon Smith Barney, Inc.*, 313 F.3d 796 (2d Cir. 2002), *cert. denied*, 540 U.S. 822 (2003) ("*Friedman*").

4. *In Re Stock Exchange Options Trading Antitrust Litigation*, 317 F. 3d 134 (2d Cir. 2003).

was filed, no new antitrust cases have been brought against underwriters.

In this specific case, the remaining four-fifths of the motion to dismiss will be considered under the remand instructions of the Decision. This includes instructions based on the Court's decision in *Verizon Communication, Inc. v. Law Offices of Curtis V. Trinko*, 540 U.S. 398 (2004) (denying implied antitrust immunity but dismissing for failure to state a claim - - - a ground for the pending motion to dismiss the claim here that has not yet been considered by any court below).

Thus, correcting the Petitioners' painfully incorrect prediction once again illustrates why certiorari should be denied here.

SUMMARY

When the Commentary's errors are corrected, it is clear that what Petitioners are really challenging here is not any supposed conflict between the Decision and this Court's prior implied antitrust immunity decisions.

Rather, Petitioners are asking this Court to give them what Congress, for decades, has wisely refused to provide: blanket immunity from antitrust prosecutions. Petitioners' latest grounds for this are an exclusive remedy argument that was neither briefed nor considered below and is contrary to Congress' express savings clauses and a century of antitrust prosecution.

For this further reason and the reasons previously set forth by the Billing plaintiffs, the Petition's asserted grounds for certiorari are non-existent and the Petition should be denied.

Respectfully submitted,

CHRISTOPHER LOVELL
Counsel of Record
VICTOR E. STEWART
RYAN E. LONG
LOVELL STEWART
HALEBIAN LLP
500 Fifth Avenue
New York, NY 10110
(212) 608-1900

J. DOUGLAS RICHARDS
MILBERG WEISS BERSHAD
& SCHULMAN LLP
One Pennsylvania Plaza
New York, NY 10119
(212) 594-5300

RICHARD S. SCHIFFRIN
SCHIFFRIN & BARROWAY LLP
280 King of Prussia Road
Radnor, PA 19087
(610) 667-7706

HOWARD B. SIROTA
SIROTA & SIROTA LLP
110 Wall Street, 21st Floor
New York, NY 10005
(212) 425-9055

FRED TAYLOR ISQUITH
WOLF HALDENSTEIN ADLER
FREEMAN & HERZ LLP
270 Madison Avenue
Ninth Floor
New York, NY 10016
(212) 545-4600

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No. 05-1157

IN THE

Supreme Court of the United States

CREDIT SUISSE FIRST BOSTON LTD., *et al.*,

Petitioners,

v.

GLEN BILLING, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

SUPPLEMENTAL BRIEF FOR RESPONDENTS

CHRISTOPHER LOVELL
Counsel of Record
VICTOR E. STEWART
GARY S. JACOBSON
LOVELL STEWART HALEBIAN LLP
500 Fifth Avenue
New York, NY 10110
(212) 608-1900

(Additional Counsel Listed on Signature Page)

204966

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

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Pursuant to this Court's Rule 15.8, Respondents (plaintiffs-appellants below) respectfully address the new matters raised in the Brief of the United States filed November 9, 2006 ("U.S. Br.").

The U.S. argues that the petition should be granted but then apparently disagrees with Petitioners' main immunity arguments throughout this case. The U.S. substitutes, instead, a pleading standards argument that was never raised by the parties, never raised by an amicus, never considered by any Court below and has never been considered by any court in the United States. *Yee v. City of Escondido*, 503 U.S. 519, 538 (1992) (declining to address an issue that "we would apparently be the first court in the Nation" to consider).

Granting certiorari to consider the United States' novel proposed pleading standard argument would violate Rule 14.1(a) (*see* "B" below) in order to consider an unprecedented standard that is contrary to decades of precedent by this Court. *See* "C" below.

A. Background

Respondents have alleged "an epic Wall Street conspiracy"[1] in which the ten largest investment banks conspired to require from customers tie-in consideration (the "anti-competitive charges") for allocations of shares of certain initial public offerings ("IPOs") and to inflate the aftermarket prices of those securities above the IPO price. *See* Consolidated Amended Class Action Complaint (Jan. 2, 2002) ("C") ¶¶ 1, 4(a), 4(b), 41-42, 65-66.

Consistent with decades of precedent from this Court, the United States[2] was quite clear in its brief to the Court of Appeals for the Second Circuit, that such a conspiracy was not impliedly immune from prosecution under the antitrust laws and that **any** "allegations in the complaint" involving

1. *Billing v. Credit Suisse First Boston Ltd.*, 426 F.3d 130, 136 (2d Cir. 2005) ("*Billing*"); App. 1a.

2. The Department of Justice noted that it had reviewed the amicus brief previously filed by the Securities and Exchange Commission (the "Commission"), and distinguished the Commission's brief from its own in part by noting that "that brief (unlike this brief for the United States) was not approved by the Acting Solicitor General and does not state the views of the United States." App. 200a at n. 1.

permissible activity would justify immunity "only to the minimum extent necessary." *E.g.*:

> [T]he securities laws and SEC regulations have long prohibited tying and laddering because of the serious threats such practices pose both to competition and to . . . the securities markets. . . . [T]he Commission has never authorized tying and laddering, nor has it even considered doing so. Accordingly, the United States believes there is no demonstrated 'potential for regulatory permission of the conduct at issue. . . .'
>
> . . . . Because '[t]he antitrust laws represent a fundamental national economic policy,' '[i]mplied antitrust immunity is not favored, and can be justified only by a convincing showing of clear repugnancy between the antitrust laws and the regulatory system. . . .'
>
> . . . . And even where conflicts between the antitrust laws and the regulatory scheme **warrant immunity as to some allegations of a complaint**, the 'baseline principle' is that repeal of the antitrust laws is implied 'only if necessary to make the [regulatory law] work' and '**even then only to the minimum extent necessary**. . . .'

App. 201a-203a (footnotes omitted) (citations omitted) (emphasis supplied).[3]

The Second Circuit recited these same immunity standards and adopted the result advocated by the United States.

> [I]t is important to recall that an implied immunity analysis always begins with the notion that repeal by implication is always disfavored. *See Silver*, 373 U.S. at 357, 83 S.Ct. 1246. Nonetheless, implied repeal may arise in the face of a clear repugnancy between antitrust and regulatory provisions **but, importantly, only to the**

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3. The United States also noted below that its proposed immunity standard as an amicus curiae in *In re Stock Exchanges Options Trading Antitrust Litig.*, 317 F.3d 134 (2d Cir. 2003) ("*Options*") was actually more restrictive than that of the Second Circuit. App. 203a n. 3, *id.* 207a. The United States reiterated below its disagreement "with the result in *Options*." App. 203a n. 3; *see also* App. 207a & n. 8.

> **extent necessary to make the regulatory provisions work.** *Id.* at 357, 83 S.Ct. 1246.

426 F.3d at 164; App. 56a-57a (emphasis supplied).[4]

Now, the United States appears to continue to argue that a conspiracy to require tie-in transactions, including laddering, as additional consideration for IPO shares, is not immune from prosecution under the antitrust laws. U.S. Br. at 4 n.2; *see also id.* at 15-16 ("petitioners are also wrong in their view that all conduct connected with initial public offerings is impliedly immune from antitrust liability because the SEC exercises 'pervasive' regulatory authority over it.").

However, the United States has also created a new argument. Petitioners' alleged conspiracy, which the United States has said is not impliedly immune from antitrust prosecution, App. 207a ("the allegations of tying and laddering – practices that are strictly prohibited under the securities laws and that the SEC has never permitted or proposed to permit – should not be dismissed on implied immunity grounds"), should be judged by a novel pleading standard.[5]

Specifically, the U.S. emphasizes that Respondents allege that, among the ways that petitioners entered and implemented the conspiracy, is that Petitioners abused permissible or arguably permissible types of conduct as occasions in which they entered into or implemented the prohibited conspiracy. U.S. Br. at 2-3. The permissible types of conduct which afforded these occasions include defendants' contacts with one another during underwriting syndicates, road shows, and voluntary industry associations.

The U.S. then indulges in the following never-before-permitted prediction. *See* p. 8 *infra*. The alleged conspiratorial

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4. Thus, the Court below recited that "immunity can arise only when there is a potential specific conflict between the antitrust laws and a regulatory regime," (App 57a) which echoed the United States' proposal that "[a]bsent a demonstrated potential for conflict . . . it is presumed that Congress intended that both the regulatory scheme and the antitrust laws apply . . . ." App. 203a. Actually, the U.S. made clear that it favored a higher bar to antitrust immunity but was constrained by the easier test for immunity articulated by the Second Circuit in *Options*. *See* n.3 *supra*.

5. The United States' proposed standard is wholly contrary to decades of precedent and the United States' own "immunity is appropriate only to the minimum extent necessary" position presented to the court below.

conduct in this case will supposedly be so "inextricably intertwined" with permissible conduct that immunity must be granted to the maximum extent possible at the motion to dismiss stage unless respondents can satisfy the following novel pleading standard:

> [T]he complaint must allege facts providing concrete notice and giving rise to a reasonably grounded expectation, *see Dura Pharms., Inc. v. Broudo*, 544 U.S. 336, 347 (2005), that the alleged antitrust offense can be established without relying on activities that are authorized under the regulatory scheme or inextricably intertwined with such immune activities.

U.S. Brief at 13, *see also id.* at 8, 11.[6] The United States cites to no case in which a court has made a prediction at the pleading stage that discovery will prove that a prohibited antitrust conspiracy is "inextricably intertwined" with the permissible conduct that defendants converted into occasions in which to form or implement the prohibited conspiracy. *See* p. 8 *infra*.

B. This Court Should Not Grant Certiorari To Resolve An "Unpresented Question" That Was Neither Raised Nor Considered By Any Court Below Or Elsewhere

Rule 14.1(a) of this Court's Rules states in part: "Only the questions set out in the petition, or fairly included therein, will be considered by the Court." The United States' proposed novel pleading standard presents a "question" not considered by any court below, not raised by any of the parties or other amici, and which has never been previously considered by any court. *See Yee*, 503 U.S. at 519.

The only question before the Court is the assertion of an implied immunity affirmative defense, a procedural inquiry that "'in no way depends on the merits'" of the case.'"

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6. The U.S. incorrectly refers the Court to *Dura*. The actual language from *Dura*, upon which the U.S. relies, is quite different. In *Dura*, this Court identified as one goal of the pleading rules to require *"a reasonably founded hope* that the [discovery] process will reveal relevant evidence." 544 U.S. at 347 (emphasis supplied). Notably, the word "expectation" neither appears in *Dura* nor *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 741 (1975) to which *Dura* makes reference. This Court was not attempting in *Dura* to state a broad new pleading standard as the U.S. seems to suggest.

Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Philips Corp., 510 U.S. 27, 31 (1993), quoting *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990), in turn quoting *Warth v. Seldin*, 422 U.S. 490, 500 (1975). As this Court has made clear in the context of Rule 14.1(a), a matter that is merely "complementary" or "related" to the question presented in the petition for certiorari is not "fairly included therein". *Izumi*, 510 U.S. at 31-32; *Yee*, 503 U.S. at 537.[7]

Thus, "Rule 14.1(a) . . . creates a heavy presumption against our consideration" of questions not directly presented in the certiorari petition. *Izumi*, 510 U.S. at 32; *Yee*, 503 U.S. at 538.[8] Indeed, the Solicitor General has frequently advocated the denial of Supreme Court merits review for this very reason.[9] This Court has often made clear that it will disregard Rule 14.1(a) and consider "unpresented questions" "only in

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7. It makes no difference that the matter was discussed in the briefs submitted. *Izumi*, 510 U.S. at 32 n.5 ("the fact that Izumi discussed this issue in the text of its petition for certiorari does not bring it before us. Rule 14.1(a) requires that a subsidiary question be fairly included in the *question presented* [emphasis original] for our review").

8. *See also Day v. McDonough*, __ U.S. __, 126 S. Ct. 1675, 1680 n.2 (2006) ("This question was not 'set out in the petition [for certiorari], or fairly included therein,' and we therefore do not consider it here. This Court's Rule 14.1(a)"); *Blessing v. Freestone*, 520 U.S. 329, 340 n.3 (1997) ("Petitioner makes two further arguments in her briefs on the merits. . . . We decline to address these questions which were neither raised nor decided below, and were not presented in the petition for certiorari. This Court's Rule 14.1(a)").

9. *See, e.g.*, Brief for the United States in Opposition, *Ohio Environmental Protection Agency v. Nihiser*, Docket No. 01-1357 (May 15, 2002), 2002 WL 32135308 at *16 ("It is the Court's general rule that it will not grant certiorari to address arguments not pressed in, or decided by, the lower courts. [citation omitted] Since this is a court of 'review, not one of first view,' [citation omitted] the failure of petitioner to press any 'relatedness' arguments below denies this Court 'the benefit of a well-developed record and a reasoned opinion on the merits. [citation omitted]"); Brief for the United States in Opposition, *International Business Machines v. U.S.*, Docket No. 00-482 (December 2000), 2000 WL 34000084 at *9 ("Petitioner seeks to raise several other issues that it failed to raise below . . . Especially in view of the fact that neither of the courts below has addressed the issues that petitioner now belatedly seeks to raise, there are no 'exceptional circumstances' that would warrant review by this Court").

the most exceptional cases." *Izumi*, 510 U.S. at 427; *Yee*, 503 U.S. at 535; *Stone v. Powell*, 428 U.S. 481 n.15 (1976); *see also Berkemer v. McCarty*, 468 U.S. 420, 443 n.38 (1984) ("Absent unusual circumstances . . . we are chary of considering issues not presented in petitions for certiorari").[10]

> In fact, were we to address the issue here, we would apparently be the first court in the Nation to determine whether an ordinance like this one effects a regulatory taking.

Yee, 503 U.S. at 538. The United States offers no good reason to depart from this Court's practice. There are many excellent reasons not to.

C. This Court Should Not Grant Certiorari To Impose A Novel Pleading Standard That Would Contravene Decades Of This Court's Prior Decisions

Reaching to grant certiorari in order to consider the United States' novel proposed pleading standard is further inappropriate because such standard is contrary to decades of this Court's precedents regarding (i) affirmative defense and immunity pleading, (ii) substantive antitrust immunity, (iii) antitrust "safe harbors," and (iv) permissible antitrust evidence. The United States would depart from all that precedent in order to solve a predicted "inextricably intertwined" problem that does not now exist and will likely never exist. *See* p. 9 *infra*.

1. The Proposed Novel Standard Is Contrary to Decades of Pleading, Immunity, Safe Harbor, And Evidence Precedent

Pleading Precedent. First, requiring a heightened pleading standard to negate an anticipated affirmative defense contravenes decades of this Court's jurisprudence. When considering affirmative defenses based upon various types of

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10. In *Izumi*, this Court provided the following list of unusual circumstances: 1) overruling previous precedent; 2) deciding cases on nonconstitutional grounds when presented with a constitutional question; 3) absence of jurisdiction issues; and 4) plain error in the record or otherwise. 510 U.S. at 433. The grounds asserted for review by the United States are far removed from any of the enumerated categories in *Izumi* and are without other statutory or case law precedent.

immunity, this Court has made clear that: "a claim of immunity is conceptually distinct from the merits of plaintiff's claim". *Mitchell v. Forsyth*, 472 U.S. 511, 527-28 (1985); *see also Gomez v. Toledo*, 446 U.S. 635, 640 (1980) ("Moreover, this Court has never indicated that qualified immunity is relevant to the existence of the plaintiff's cause of action; instead we have described it as a defense available to the official in question"); *see also Barry Aviation Inc. v. Land O'Lakes Municipal Airport Comm'n*, 377 F.3d 682, 688 (7th Cir. 2004) ("Complaints need not anticipate defenses"); *Xechem, Inc. v. Bristol-Myers Squibb Co.*, 372 F.3d 899, 901 (7th Cir. 2004) (same).[11]

This Court has also consistently "refused to change the Federal Rules governing pleading by requiring the plaintiff to anticipate the immunity defense."[12] *Crawford-El v. Britton*, 523 U.S. 574, 595 (1998); *see also Gomez v. Toledo*, 446 U.S. at 640 ("Since qualified immunity is a defense, the burden of pleading it rests with the defendant [citations omitted]. . . . We see no basis for imposing on the plaintiff an obligation to anticipate such a defense by stating in his complaint that the defendant acted in bad faith").[13]

Substantive Immunity Precedent. Second, imposing the maximum immunity possible at the motion to dismiss stage is contrary to decades of this Court's substantive immunity

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11. Here the District Court properly held that implied immunity was "an affirmative defense that appears on the face of the complaint, and as such is properly addressed at the motion to dismiss stage." *In re IPO Antitrust Litig.*, 287 F. Supp. 2d 497, 501-02 (S.D.N.Y. 2003), App. 77a; *accord, Options*, 317 F. 3d at 150 (same).

12. This Court has also long refused to require heightened pleading standards in addition to the express instances required by Rule 9(b) of the Federal Rules of Civil Procedure. Any such requirement "must be obtained by the process of amending the Federal Rules, and not by judicial interpretation." *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163, 168 (1993).

13. *See also Thomas v. Independence Township*, 463 F.3d 285, 293-94 n.2 (3d Cir. 2006) ("As stated in *Gomez* and reaffirmed in *Crawford-El*, the burden of pleading qualified immunity rests with the defendant, not the plaintiff. . . . Because we conclude that plaintiffs have no duty to plead allegations in anticipation of a qualified immunity defense, we rather easily conclude that plaintiffs do not have the concomitant duty to do so with particularity").

precedent. As the United States told the Second Circuit, the fundamental importance of the antitrust laws requires that implied immunity be disfavored, such that "even where conflicts between the antitrust laws and regulatory scheme warrant immunity as to some allegations of the complaint," immunity may be implied "only to the minimum extent necessary." App. 202a, citing to *Silver v. New York Stock Exchange*, 373 U.S. 341, 357 (1963); *see* p. 2 *supra*.

In vivid contrast, the sole, wholly unrelated "precedent" cited by the United States as a basis for its novel pleading standard arose from the immunity of **public officials** and holds that the "outer reaches" of their immunity should be protected. U.S. Brief at 11 n.4 (*citing* to *Nixon v. Fitzgerald*, 457 U.S. 731 (1982)). The palpable need to uphold the "outer reaches" of public officials' immunity contrasts sharply with the need to immunize an "epic conspiracy" of profit-oriented private citizens from the "Magna Carta of free enterprise" and the "economic bill of rights". *United States v. Topco Associates, Inc.*, 405 U.S. 596, 610 (1972).

Antitrust "Safe Harbor" And Evidentiary Precedent. Third, the United States' novel pleading standard is contrary to numerous safe harbor and evidentiary decisions by this Court and other courts. Far from requiring heightened pleading protection, these decisions have uniformly held that otherwise permissible steps under the antitrust laws may not be abused in order to enter into or carry out a prohibited conspiracy.[14]

14. *See United Mine Workers v. Pennington*, 381 U.S. 657 (1965) (fact that defendants used other conduct permitted under regulatory scheme to engage in conduct prohibited under the regulatory scheme and the antitrust laws would not provide ground for claiming immunity); *Silver v. New York Stock Exchange*, 373 U.S. 341 (1963) (fact that defendants were members of a stock exchange and thereby empowered to communicate with each other to create rules and by-laws governing their relations with the public and with each other was never advanced as a basis for finding applied immunity for alleged anticompetitive collective action in promulgating certain rules); *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 379 U.S. 690, 707 (1962) ("it is well settled that acts which are in themselves legal lose that character when they become constituent elements of an unlawful scheme [citations omitted]").

(Cont'd)

Finding The Conduct To Be "Inextricably Intertwined" Fails To Draw Reasonable Inferences In Favor Of the Complaint. Fourth, the proposed novel pleading standard tries to solve a problem that does not exist. Respondents obviously do not contend that petitioners be restrained from forming syndicates, conducting road shows, and participating in industry associations.

Instead, Respondents assert that petitioners cannot abuse their participation in permitted activities as occasions in which they form or implement a prohibited conspiracy to inflate their charges or aftermarket prices. It is the activity in forming and implementing the prohibited conspiracy, not the fortuitous factual context in which that activity allegedly occurred, that respondents allege to violate the antitrust laws.

Tellingly, the United States fails to cite to a case where the formation of a prohibited conspiracy during permitted meetings has barred a claim for prohibited activity as a matter of law, has otherwise been held to be "inextricably intertwined" with the prohibited activity, or has impliedly immunized the prohibited activity. U.S. Br. *passim*. There is not now and has never been a safe harbor to convert lawful or immunized activities into occasions in which to hatch or implement prohibited conspiracies. *See* cases collected at note 14 *supra*.

(Cont'd)

See also In re Brand Name Prescription Drugs Antitrust Litig., 186 F. 3d 781, 784-85 (7th Cir. 1999) (cooperative behavior would be permitted under trade association auspices or otherwise and under the antitrust laws provided behavior does not reduce competition among participants); *Ice Cream Liquidation, Inc. v. Land O'Lakes, Inc.*, 253 F. Supp. 2d 262, 267 (D. Conn. 2003) (in case involving alleged collusion to fix prices of certain staple products that were components of a federally regulated formula for minimum milk prices, implied immunity did not apply where plaintiff's challenge was not to the federal milk pricing formula but rather to the defendants' conduct in manipulating the underlying components of the formula); *see also* VII P. Areeda & H. Hovenkamp, *Antitrust Law*, Section 1477 at 315 (2d ed. 2003).

Furthermore, questions of immunity cannot be treated as rules of evidence that exclude proof of an unlawful conspiracy. While such evidence can be excluded under Fed. R. Evid. R. 403 if confusing or unduly prejudicial, there is no blanket rule of inadmissibility. *See In re Brand Name Prescription Drugs*, 186 F. 3d at 789.

Moreover, to characterize the activities as "inextricably intertwined" is to make predictions that are contrary to the well-pled allegations of the amended complaint and to fail to draw reasonable inferences in favor of the amended complaint. *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). As with other prohibited conspiracies, this one may be formed or implemented through means that are themselves lawful or unlawful. *E.g., In re High Fructose Corn Syrup Antitrust Litig.*, 295 F.3d 651, 655 (7th Cir. 2002) (Posner, J.).

Finally, the United States does not point to any split in the circuits regarding its proposed questions or the question presented by Petitioners. Similarly, the United States does not point to any recurrence of the challenged conduct or of lawsuits alleging that similar "epic conspiracies" have existed or recurred. Given the United States' apparent position that a conspiracy to require tie-ins or laddering does not violate the antitrust laws, there is now absolutely no reason for this Court to become the first Court in the Nation to consider a novel pleading standard that is contrary to so many of this Court's precedents.

CONCLUSION

For the foregoing reasons, and all those stated in the Brief in Opposition, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

CHRISTOPHER LOVELL
Counsel of Record
VICTOR E. STEWART
GARY S. JACOBSON
LOVELL STEWART HALEBIAN LLP
500 Fifth Avenue
New York, NY 10110
(212) 608-1900

J. Douglas Richards
Milberg Weiss Bershad
& Schulman LLP
One Pennsylvania Plaza
New York, NY 10119
(212) 594-5300

Richard S. Schiffrin
Schiffrin & Barroway LLP
280 King of Prussia Road
Radnor, PA 19087
(610) 667-7706

Howard B. Sirota
Sirota & Sirota LLP
110 Wall Street, 21st Floor
New York, NY 10005
(212) 425-9055

Fred Taylor Isquith
Wolf Haldenstein Adler
Freeman & Herz LLP
270 Madison Avenue
Ninth Floor
New York, NY 10016
(212) 545-4600

Attorneys for Respondents

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In the Supreme Court of the United States

CREDIT SUISSE FIRST BOSTON LTD., ET AL.,

Petitioners,

v.

GLEN BILLING, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

SUPPLEMENTAL BRIEF FOR PETITIONERS

ROBERT B. MCCAW
LOUIS R. COHEN
ALI M. STOEPPELWERTH
FRASER L. HUNTER, JR.
NOAH A. LEVINE
WILMER CUTLER PICKERING
HALE & DORR LLP
399 Park Avenue
New York, New York 10022
(212) 230-8800
Attorneys for Petitioner Citigroup Global Markets Inc.

STEPHEN M. SHAPIRO
Counsel of Record
KENNETH S. GELLER
TIMOTHY S. BISHOP
JOHN P. SCHMITZ
MAYER, BROWN, ROWE & MAW LLP
1909 K Street, N.W.
Washington, D.C. 20006
(202) 263-3000
Attorneys for Petitioner Merrill Lynch, Pierce, Fenner & Smith Incorporated

Counsel for Petitioners
[Additional Counsel Listed On Signature Page]

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SUPPLEMENTAL BRIEF FOR PETITIONERS

The United States has filed a brief signed by both the SEC and the Antitrust Division urging this Court to grant certiorari and reverse the Second Circuit's ruling denying antitrust immunity. The United States explained in its brief that the court of appeals' erroneous decision "failed to give adequate effect to the securities laws" and as a result threatens to "undercut critical national regulatory policies and interfere with the capital formation process." U.S. Br. 8, 19. The United States demonstrated that, "[a]s a practical matter," the erroneous immunity standards adopted by the Second Circuit will govern IPOs throughout the country because venue "will generally lie within the Second Circuit." *Id.* at 9. And it emphasized the "paramount importance" of avoiding disruption of the "Nation's vitally important financial markets" caused by an immunity standard that will "chill legitimate activity." Accordingly, the Solicitor General has concluded that "certiorari should be granted" to resolve immunity issues as to which "clarity" is "critical." *Ibid.* The same conclusion was previously expressed in *amicus* filings by the National Association of Securities Dealers and the New York Stock Exchange, self-regulatory organizations that, along with and closely overseen by the SEC, have regulatory authority over IPOs. See also Pet. Supp. Br. (June 12, 2006) (quoting SEC Commissioner Paul Atkins).

Plaintiffs' response to the United States confirms that this Court's review is necessary to overturn a denial of implied immunity that is inconsistent with this Court's decisions in *Gordon* v. *New York Stock Exch.*, 422 U.S. 659 (1975), *United States* v. *National Ass'n of Sec. Dealers*, 422 U.S. 694 (1975), and *Verizon Comms.* v. *Law Offices of Curtis V. Trinko*, 540 U.S. 398 (2004). Plaintiffs cite not one of those controlling precedents in their supplemental submission and do not attempt to address the United States' showing that the court of appeals' ruling is a direct threat to the operation of public securities markets regulated by the SEC.

Plaintiffs quote at length from the submissions of the Antitrust Division below arguing against immunity, without acknowledging that the SEC was equally vigorous in urging that immunity here is essential to the functioning of the securities regulatory regime in which it supervises all of the alleged conduct. The Solicitor General's brief to this Court "reflects the considered view of the United States." U.S. Br. 4 n.2. The SEC and Antitrust Division now speak with one voice in urging that certiorari should be granted to reverse an erroneous decision on an "important and recurring" issue that has produced "confusion in the lower courts"—an error that threatens to gut "the statutory scheme for regulating public offerings of securities." *Id.* at 7, 9. While plaintiffs quarrel with the Solicitor General on the merits issues, they have no answer to his showing that this case imperatively calls for further review.

1. The immunity analysis presented by the United States requires dismissal of these claims. Plaintiffs object that the immunity standard set forth in the brief of the United States—that securities market participants are immune from antitrust suits that "ultimately rest on collaborative activities that are either permitted under the securities laws or inextricably intertwined with such permitted activities" (U.S. Br. 8)—is a "new argument" that differs from petitioners' immunity arguments and has not previously been presented. But the United States has properly focused on an important aspect of the repugnance analysis, which petitioners presented in the petition for certiorari.

Petitioners have explained that immunity from plaintiffs' suits flows directly from the standards set forth by this Court in *Gordon* and *NASD*. Scrutiny by an antitrust jury in a treble damages action is plainly repugnant to the securities regulatory scheme because the SEC and SROs have by regulation and enforcement action exercised "direct regulatory power" over exactly the same tie-in and commission practices plaintiffs allege, and because exercise of regulatory authority is

"sufficiently pervasive" to oust the antitrust laws. See Pet. 20-24; Pet. Reply to Billing 2-4; *Gordon*, 422 U.S. at 682, 685; *NASD*, 422 U.S. at 730-734. But petitioners also agree with the United States that immunity may be conferred here under the rationale that all the conduct alleged is either permitted by SEC regulation or is "directly related to" or "inextricably linked" with permitted conduct (U.S. Br. 9, 11)—formulations that rephrase the criteria set out in *Gordon* and *NASD* but similarly seek to identify whether antitrust scrutiny may "conflict" with the administrative scheme.

The complaints, plaintiffs concede (at 3, 9), refer to a host of joint activities that are permissible and encouraged by the SEC, such as the operation of underwriting syndicates, conduct of road shows, and building the IPO book. The tie-in and commission practices that plaintiffs allege are inextricably intertwined with those permitted activities. For example, the United States has pointed out that the SEC has "specifically approved" book-building inquiries into a customer's long-term interest in an IPO stock and the price at which it might accumulate a position in the aftermarket "as important in determining the size and price of the offering" and "the allocation of shares." U.S. Br. 15. Distinguishing "legitimate book-building" from attempts "to induce a bid or purchase," SEC guidance indicates, "depends on the particular facts and circumstances" of each communication. Pet. App. 225a.

Whether particular conversations crossed the lines drawn by the SEC under securities laws standards is inextricably linked with book-building conduct approved by the agency. A lay jury's consideration of that question under competition-first antitrust principles would inevitably lead to conflict with the SEC's expert judgment and undermine the congressional goal of consistent administrative supervision. See Pet. App. 129a n.2, 156a, 196a-197a; *Brown* v. *Pro Football*, 518 U.S. 231, 240-242 (1996); AREEDA & HOVENKAMP, ANTITRUST LAW ¶ 243a, at 77 (Supp. 2006) ("permitting the antitrust challenge [in these cases] permits a jury to decide an

issue that gave the SEC's own experts considerable difficulty"). The risk of jury condemnation and treble damages awards to huge classes of investors based on the interpretation of a word or phrase uttered during book-building conversations would, the United States recognizes, "chill legitimate activity" approved by the SEC and "effectively vitiate the immunity for the authorized conduct and thus conflict with the regulatory scheme." U.S. Br. 9, 11. The fact that plaintiffs are attacking permissible book-building practices and regulated practices directly linked to them lies at the heart of petitioners' case for immunity. See Pet. 9, 27-30; Pet. Reply to Billing 6-9; see also Pet. App. 193a-194a.

The conduct plaintiffs allege with regard to commissions is likewise "inextricably intertwined" with conduct permitted by the SEC. Whether a commission payment is proper under the securities laws is a complex question. See Pet. 8. The difficulty of parsing the facts concerning commission payments and the need to apply securities standards in conducting that inquiry is illustrated by *Invemed Assocs.*, where an NASD panel determined that higher-than-normal commissions paid by customers seeking IPO allocations did not violate NASD rules. See Pet. Reply to Pfeiffer 3-4. After a detailed review of testimony concerning particular customer relationships and commission payments, as well as expert evidence, the hearing panel held that none of the 700 payments in question was unlawful. There is no reason to expect that a lay jury applying general antitrust criteria would reach the same result. As with plaintiffs' tie-in allegations, fear of "mistaken inferences" and "false condemnations" leading to open-ended class action liability would cause market participants to refrain from engaging in permissible activities (*Trinko*, 540 U.S. at 414), making immunity essential to protect the regulatory scheme. See *Gordon*, 422 U.S. at 685, 690 (finding immunity where SEC had "direct regulatory power" over "rules and practices" regarding commissions); Pet. 26-28.

These conflicts with the regulatory scheme are of great practical concern because plaintiffs' antitrust suits are subject to none of the limits that Congress and this Court have imposed on private securities actions to curb "abuses of the class action vehicle in litigation involving nationally traded securities," including the "targeting of deep-pocket defendants" and extraction of "extortionate settlements." *Merrill Lynch* v. *Dabit*, 126 S. Ct. 1503, 1510-1511 (2006). Those safeguards, evaded here, include limiting recovery for "manipulative and deceptive practices" in public securities markets to *single* damages, as well as rigorous pleading, class action, and discovery rules. 15 U.S.C. § 78bb; Pet. 29-30; see AREEDA & HOVENKAMP, *supra*, ¶ 243, at 76-77 (Supp. 2006) (observing that many claims of securities fraud or manipulation "can be pled as an antitrust violation").

2. The arguments presented by the United States are fairly included in the question presented in the petition. Plaintiffs are incorrect in asserting (at 4-6) that the United States' arguments are barred by Supreme Court Rule 14.1(a). Under that rule a question presented "is deemed to comprise every subsidiary question fairly included therein." The "inextricably intertwined" standard for implied immunity is easily subsumed in petitioners' question presented concerning the circumstances under which courts should imply immunity from an antitrust suit challenging heavily regulated conduct during securities offerings. See Pet. I; STERN, GRESSMAN, *ET AL.*, SUPREME COURT PRACTICE § 6.25(f), at 413 (8th ed. 2002) ("it is unnecessary to convert into a separate question every subsidiary issue that is implicit or necessarily involved in the question presented"). The position of the United States, moreover, is simply a synthesis of arguments made by the Antitrust Division and the SEC and considered by the courts below, and a variation on the immunity arguments made by petitioners throughout this litigation. U.S. Br. 4 n.2; *supra*, pp. 2-4. "Once a federal claim is properly presented," the United States as *amicus curiae* is free to make "any argument

in support of that claim." *Harris Trust & Savings Bank* v. *Salomon Smith Barney*, 530 U.S. 238, 245 n.2 (2000).

The decisions relied on by plaintiffs have no relevance here. In *Yee* v. *City of Escondido*, 503 U.S. 519, 537 (1992), the regulatory takings claim this Court declined to consider was legally distinct from the physical takings claim presented in the petition and "neither of the two questions [was] subsidiary to the other." In *Izumi Seimitsu* v. *U.S. Philips*, 510 U.S. 27, 32 (1994), the question whether courts of appeals should routinely vacate judgments when cases are settled on appeal did not fairly include the "analytically and factually" distinct issue whether the petitioner was improperly denied leave to intervene. Here, by contrast, the arguments advanced by the United States address the very same issue raised by the question presented—the circumstances under which courts should imply immunity from antitrust law challenges to highly regulated conduct during securities offerings—and so are fairly included in that question. See *City of Sherrill* v. *Oneida Indian Nation*, 544 U.S. 197, 214 n.8 (2005).

Beyond this, none of plaintiffs' arguments in the supplemental brief undermines our showing—supported by the United States—of the certworthiness of these cases. The United States agrees with petitioners that the Second Circuit's decision will undercut the "critical national regulatory policies" that *Gordon* and *NASD* sought to protect, that it is of "paramount importance" that the court of appeals' ruling threatening market participants with treble damages not be allowed to undermine "the capital formation process in this country," and that there is "continuing confusion in the lower courts" regarding the "recurring" issue of when antitrust immunity should be implied. U.S. Br. 9, 11, 19. This case clearly merits review regardless of the application of Rule 14.1(a) to any particular argument made by the United States.

3. Immunity issues are properly resolved on a motion to dismiss. Plaintiffs assert (at 6-8) that the United States

would hold them to a "heightened pleading standard" that requires them to negate an affirmative defense, at odds with the principle that immunity is disfavored and should be implied narrowly. But the Solicitor General nowhere in his brief suggests that more has to be pled than Rule 8 requires. See also Br. of the United States as *Amicus Curiae* in *Bell Atlantic* v. *Twombly*, No. 05-1126. He simply contends that plaintiffs' conclusory allegations, which on their face rest on conduct either permitted by the SEC or intertwined with permitted conduct, cannot be the basis for massive antitrust suits that endanger the securities regulatory system and capital formation process. U.S. Br. 13-15.

Plaintiffs have pled themselves out of court, like the plaintiffs in *NASD*, whose claims were dismissed with prejudice on implied immunity grounds. 422 U.S. at 697, aff'g 374 F. Supp. 95, 114 (D.D.C. 1973). Even if the threshold issue of immunity is viewed as a defense, the decisions upon which plaintiffs rely acknowledge that a defense "may be resolved definitively on the face of the complaint" when the plaintiff pleads the basis for the defense. *Barry Aviation* v. *Land O'Lakes Mun. Airport*, 377 F.3d 682, 688 (7th Cir. 2004); see also *Xechem, Inc.* v. *Bristol-Myers Squibb*, 372 F.3d 899, 901 (7th Cir. 2004). And plaintiffs concede (at 7 n.11) that the district court here "properly held that implied immunity was 'an affirmative defense that appears on the face of the complaint, and as such is properly addressed at the motion to dismiss stage.'"

Every motion to dismiss on immunity grounds—even the very different qualified immunity ground at issue in most of plaintiffs' authorities—requires the district judge to look at the facts pled in the complaint to see if immunity applies. *E.g.*, *Mitchell* v. *Forsyth*, 472 U.S. 511, 528 (1985) ("resolution of these [qualified immunity] issues will entail consideration of the factual allegations that make up the plaintiff's claims for relief"); *Crawford-El* v. *Britton*, 523 U.S. 574, 598 (1998) ("the district court should resolve that threshold ques-

tion [of qualified immunity] before permitting discovery" by deciding "whether, assuming the truth of the plaintiff's allegations, the official's conduct violated clearly established law"). Whether "allowance of an antitrust suit would conflict with the operation of the regulatory scheme" is a "legal question" well suited to determination on the pleadings. *Gordon*, 422 U.S. at 688; see *NASD*, 422 U.S. at 700-702. Plaintiffs allege conduct that is all closely regulated by the SEC and SROs and that is either permitted by regulators or inextricably intertwined with permitted activity. It is therefore a straightforward matter to determine that immunity is required to allow the securities regulatory scheme to function as Congress intended, whether that question is analyzed under the principles set forth in *Gordon* and *NASD* or the Solicitor General's interpretation of them. See *supra*, pp. 2-5; *Van Buskirk* v. *New York Times*, 325 F.3d 87, 91-92 (2d Cir. 2003) (dismissal with prejudice proper when complaint is "not reasonably susceptible" to an interpretation that cures the legal deficiency and provides no "'indication that a valid claim might be stated'").

4. Plaintiffs' conspiracy arguments do not overcome immunity. Citing decisions of this Court which are not relevant because the conduct at issue was not subject to regulatory oversight, plaintiffs assert that a "prohibited conspiracy" or other "prohibited activity" carried out in the course of lawful conduct cannot be impliedly immune. Pl. Supp. Br. 8-10 & n.14. This Court's precedents contradict that argument. For example, by the time *Gordon* reached this Court the SEC had outlawed fixed commission rates as horizontal price fixing, yet this Court implied immunity. 422 U.S. at 682. In *NASD* plaintiffs alleged horizontal and vertical conspiracies to fix prices and quash development of a secondary market in mutual fund shares, yet immunity was implied. 422 U.S. at 701-704. In *Trinko* this Court observed that had it not been for an antitrust savings clause the regulatory scheme created by the Telecommunications Act would have been a "good

candidate for implication of antitrust immunity," even though plaintiffs alleged a clear violation of a statutory duty and Verizon had entered into a consent decree and paid millions of dollars to the United States and competitors. 540 U.S. at 401, 403-406. In *Pan Am. Airways* v. *United States*, 371 U.S. 296 (1963), the Civil Aeronautics Board condemned a joint ownership arrangement as "disruptive of the regime visualized by" Congress in the Federal Aviation Act and "out of harmony with the [FAA's] statutory standards for competition," yet this Court held that an antitrust challenge to the arrangement "should have been dismissed" because whether "transactions of that character meet the standards of competition and monopoly provided by the [FAA] is peculiarly a question for the Board." *Id.* at 309-313 & n.19; see *id.* at 310 ("If the courts were to intrude independently with their construction of the antitrust laws, two regimes might collide"). See also *Hughes Tool Co.* v. *TWA*, 409 U.S. 363, 405 n.18 (1973) (implying immunity although, according to the dissenting Justices, the challenged practices were undertaken "without [regulatory] approval or knowledge"); *Brown*, 518 U.S. at 235 (1996) (implying immunity though defendants "unilaterally implemented" a change in terms of employment that appeared to violate federal labor laws).

It is thus demonstrably false to claim, as plaintiffs do (at 9), that "forming and implementing [a] prohibited conspiracy" cannot be immune from antitrust scrutiny, even if the conduct is regulated by an expert agency that takes competition into account. And it is beside the point here, where the question *whether* particular conduct was prohibited depends on nuanced distinctions drawn under securities law standards. The fact that antitrust juries applying competition-first principles will not replicate securities regulators' judgments creates the potential for conflict that makes implied immunity necessary to protect the regulatory scheme.

5. The amicus brief filed by the United States confirms the need for this Court's review. Contrary to plaintiffs'

contention (at 10) that "the United States' apparent position that a conspiracy to require tie-ins or laddering does not violate the antitrust laws" provides "no reason" for this Court's review, that position is a compelling reason to grant certiorari. The Solicitor General has shown that the Second Circuit erred as a matter of law regarding an issue of enormous importance to the capital formation process. Plaintiffs have not begun to suggest how their allegations could be viewed as anything other than a direct attack on conduct that is permitted by the SEC and closely intertwined with permitted activity. And they have said not a word to refute our showing that under *Gordon*, *NASD*, and *Trinko*, the danger of conflict with the securities regulatory scheme is inescapable and severe when treble damages attacks are made on permissible syndication practices and directly related underwriting activities that are closely supervised by the expert agency.

Although plaintiffs assert (at 10) that the question presented is not a recurring one, they do not deny our showing—reinforced by the United States—that these "epic" class actions could be refiled whenever the stock market declines. The same claim could always be made: that underwriters acting together in syndicates "agreed" and made inquiries of customers about their aftermarket interest in the IPO stock. Then nationwide class action antitrust proceedings focused on hundreds of IPOs could be utilized to extract immense settlements, given the inevitable risk of false condemnations by antitrust juries. The United States is right in saying that this would cripple our financial markets.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted.

ROBERT B. MCCAW
LOUIS R. COHEN
ALI M. STOEPPELWERTH
FRASER L. HUNTER, JR.
NOAH A. LEVINE
WILMER CUTLER PICKERING
HALE & DORR LLP
399 Park Avenue
New York, New York 10022
(212) 230-8800
Attorneys for Petitioner Citigroup Global Markets Inc.

ANDREW J. FRACKMAN
TIMOTHY J. MURIS
RICHARD G. PARKER
BRENDAN DOWD
O'MELVENY & MYERS LLP
Seven Times Square
New York, New York 10036
(212) 326-2000
Attorneys for Petitioner Robertson Stephens, Inc.

CARTER G. PHILLIPS
A. ROBERT PIETRZAK
JOEL M. MITNICK
SIDLEY AUSTIN LLP
787 Seventh Avenue
New York, New York 10019
(212) 839-5300
Attorneys for Petitioner Deutsche Bank Securities Inc.

STEPHEN M. SHAPIRO
Counsel of Record
KENNETH S. GELLER
TIMOTHY S. BISHOP
JOHN P. SCHMITZ
MAYER, BROWN, ROWE & MAW LLP
1909 K Street, N.W.
Washington, D.C. 20006
(202) 263-3000
Attorneys for Petitioner Merrill Lynch, Pierce, Fenner & Smith Incorporated

ANDREW B. CLUBOK
RICHARD A. CORDRAY
BRANT W. BISHOP
KIRKLAND & ELLIS LLP
655 15th Street, N.W.
Washington, D.C. 20005
(202) 879-5000
Attorneys for Petitioner Morgan Stanley & Co. Inc.

SHEPARD GOLDFEIN
PREETA D. BANSAL
JAMES A. KEYTE
SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP
Four Times Square
New York, New York 10036
(212) 735-3000
Attorneys for Petitioner Janus Capital Management LLC

RICHARD A. CIRILLO
KAREN R. KOWALSKI
KING & SPALDING LLP
1185 Avenue of the Americas
New York, New York 10036
(212) 556-2100
Attorneys for Petitioner Credit Suisse First Boston LLC

MOSES SILVERMAN
PHILIP G. BARBER
PAUL, WEISS, RIFKIND, WHARTON & GARRISON LLP
1285 Avenue of the Americas
New York, New York 10019
(212) 373-3000
Attorneys for Petitioner Lehman Brothers Inc.

JON R. ROELLKE
JEFFREY H. DRICHTA
CLIFFORD CHANCE US LLP
2001 K Street, N.W.
Washington, D.C. 20006-1001
(202) 912-5000
Attorneys for Petitioner Merrill Lynch, Pierce, Fenner & Smith Incorporated

PAUL GONSON
GLENN R. REICHARDT
KIRKPATRICK & LOCKHART NICHOLSON GRAHAM LLP
1601 K Street, N.W.
Washington, D.C. 20006
(202) 778-9000
Attorneys for Petitioner Merrill Lynch, Pierce, Fenner & Smith Incorporated

GANDOLFO V. DIBLASI
PENNY SHANE
DAVID M.J. REIN
RICHARD J.L. LOMUSCIO
SULLIVAN & CROMWELL LLP
125 Broad Street
New York, New York 10004
(212) 558-4000
Attorneys for Petitioners The Goldman Sachs Group, Inc. and Goldman, Sachs & Co.

RANDY M. MASTRO
JOHN A. HERFORT
RICHARD FALEK
GIBSON, DUNN & CRUTCHER LLP
200 Park Avenue
New York, New York 10166
(212) 351-4000
Attorneys for Petitioner Bear, Stearns & Co., Inc.

STEVEN WOLOWITZ
MATTHEW INGBER
MAYER, BROWN, ROWE & MAW LLP
1675 Broadway
New York, New York 10019
(212) 506-2500
Attorneys for Petitioner Comerica, Inc.

GERALD J. FIELDS
KEVIN C. LOGUE
PAUL HASTINGS JANOFSKY
& WALKER LLP
75 East 55th Street
New York, New York 10022
(212) 318-6000
Attorneys for Petitioners Van Wagoner Capital Management, Inc. and Van Wagoner Funds, Inc.

JOHN D. DONOVAN, JR.
ROBERT G. JONES
ROPES & GRAY LLP
One International Place
Boston, Massachusetts 02110
(617) 951-7000
Attorneys for Petitioners Fidelity Distributors Corp., Fidelity Brokerage Services LLC, and Fidelity Investments Institutional Services Co., Inc.

NOVEMBER 2006

No. 05-1157

In the Supreme Court of the United States

CREDIT SUISSE FIRST BOSTON LTD., ET AL., PETITIONERS,

v.

GLEN BILLING, ET AL., RESPONDENTS.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

CERTIFICATE OF SERVICE

I, Timothy S. Bishop, counsel for petitioners and a member of the Bar of this Court, certify that on November 27, 2006, I served three copies of the Supplemental Brief for Petitioners in the above-captioned case via UPS overnight, addressed to:

Christopher Lovell
Lovell Stewart & Halebian LLP
500 Fifth Avenue
New York, NY 10110
(212) 608-1900
Counsel for Respondents Glen Billing et al.

Russel H. Beatie
Beatie & Osborn LLP
521 Fifth Avenue
New York, NY 10175
(212) 888-9000
Counsel for Respondent Milton Pfeiffer

Paul D. Clement
Solicitor General of the United States
Room 5614
Department of Justice
950 Pennsylvania Ave., N.W.
Washington, DC 20530-0001
(202) 514-2217

I certify that all parties required to be served have been served.

Timothy S. Bishop

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No. 05-1157

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Petitioners,

v.

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Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

SUPPLEMENTAL JOINT APPENDIX

STEPHEN M. SHAPIRO
Counsel of Record
MAYER, BROWN, ROWE & MAW LLP
1909 K Street, N.W.
Washington, D.C. 20006
(202) 263-3000
Counsel for Petitioners

CHRISTOPHER LOVELL
Counsel of Record
LOVELL STEWART & HALEBIAN LLP
500 Fifth Avenue
New York, NY 10110
(212) 608-1900
Counsel for Respondents Glen Billing, et al.

RUSSEL H. BEATIE
Counsel of Record
BEATIE AND OSBORN LLP
521 Fifth Avenue, 34th Floor
New York, NY 10175
(212) 888-9000
Counsel for Respondent Milton Pfeiffer

PETITION FOR CERTIORARI FILED MARCH 8, 2006
CERTIORARI GRANTED DECEMBER 7, 2006

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE INITIAL PUBLIC OFFERING ANTITRUST LITIGATION

01 Civ. 2014 (WHP), 01 Civ. 11420 (WHP)

[April 13, 2004]

MEMORANDUM AND ORDER

WILLIAM H. PAULEY III, District Judge:

On November 3, 2003 this Court issued a Memorandum and Order in this consolidated class action holding that the conduct alleged by the various plaintiffs was impliedly immune from antitrust scrutiny. *See In re Initial Public Offering Antitrust Litig.*, 287 F. Supp. 2d 497 (S.D.N.Y. 2003) ("*IPO Antitrust Litig.*").[1] On November 18, 2003, the Sherman Act Plaintiffs moved for partial reconsideration of that decision, arguing that this Court's dismissal of their state law antitrust claims was in error. Specifically, the Sherman Act Plaintiffs argue that this Court overlooked controlling decisions cited in their underlying briefs, principally *California* v. *ARC America Corp.*, 490 U.S. 93 (1989), standing for the proposition that defendants failed to overcome the presumption against federal preemption of state law. For the reasons set forth below, the Sherman Act Plaintiffs' motion for partial reconsideration is denied.

BACKGROUND

In its November 3, 2003 Memorandum and Order, this Court held that the conduct alleged by plaintiffs was impliedly immune from application of the Sherman Act given the SEC's sweeping jurisdiction to regulate the

[1] Familiarity with this Court's November 3, 2003 Memorandum and Order, and the facts and defined terms set forth therein, is presumed.

national securities markets and its explicit congressional mandate to balance competition with its other regulatory policies. *IPO Antitrust Litig.*, 287 F. Supp. 2d at 523-24. This Court also held that the federal securities regulatory regime entrusted to the SEC preempted the Sherman Act Plaintiffs' state law antitrust claims, holding that failure to apply such preemption would "eviscerate the implied immunity doctrine." *IPO Antitrust Litig.*, 287 F. Supp. 2d at 524. The Sherman Act Plaintiffs move this Court to reconsider only this latter portion of its earlier decision.

DISCUSSION

I. Standard for a Motion for Reconsideration

Local Civil Rule 6.3 provides in relevant part: "There shall be served with the notice of motion a memorandum setting forth concisely the matters or controlling decisions which counsel believes the court has overlooked." A motion for reconsideration pursuant to Local Rule 6.3 "is not a motion to reargue those issues already considered when a party does not like the way the original motion was resolved." *Yurman Design, Inc.* v. *Chaindom Enter., Inc.*, No. 99 Civ. 9307 (JFK), 2003 WL 22047849, at *1 (S.D.N.Y. Aug. 29, 2003). Thus, to be entitled to reconsideration, a movant must demonstrate that the court overlooked controlling decisions or factual matters that were put before it on the underlying motion, which, had they been considered "might reasonably have altered the result reached by the court." *Consol. Gold Fields* v. *Anglo Am. Corp.*, 713 F. Supp. 1457, 1476 (S.D.N.Y. 1989). Courts narrowly construe this standard and apply it strictly against the moving party "so as to avoid repetitive arguments on issues that have been fully considered by the court." *Lopez* v. *Comm'r of Soc. Sec.*, No. 01 Civ. 183 (NRB), 2002 WL 465298, at *1 (S.D.N.Y. Mar. 27, 2002). The decision to grant or deny a motion for reconsideration is within the sound discretion of

the district court. *See, e.g., Dietrich* v. *Bauer*, 76 F. Supp. 2d 312, 327 (S.D.N.Y. 1999).

II. Federal Preemption of State Antitrust Claims

The Sherman Act Plaintiffs fail to meet their burden for reconsideration. This Court did not overlook any controlling decisions in reaching its conclusion that the Sherman Act Plaintiffs' state antitrust claims are preempted by the federal securities regulatory regime. The parties fully briefed the issue of preemption of the state antitrust causes of action in their underlying motions, and this Court rejected plaintiffs' arguments based on *ARC America* and related cases. Their arguments are no more persuasive the second time around.

In this Court's view, *ARC America* is not a "controlling decision" with respect to the doctrine of implied immunity. In *ARC America*, the Supreme Court decided the question of whether the federal antitrust rule prohibiting indirect purchaser recovery preempted state antitrust laws expressly permitting such recovery. *ARC America*, 490 U.S. at 100. The question of whether federal antitrust law preempts contradictory state antitrust law is different and more narrow than the question presented here. In this case, the issue is whether the SEC's pervasive authority to balance competition against other forces in regulating the national securities markets, in combination with the its active regulation of and regulatory authority over the conduct alleged, renders that conduct impliedly immune from state antitrust scrutiny. As this Court held in its earlier decision, the answer to that question is yes. *IPO Antitrust Litig.*, 287 F. Supp. 2d at 524 ("To shield the securities regulatory regime from encroachment by the Sherman Act, only to expose that regime to assault by a swarm of state antitrust claims, would shatter the federal regulatory framework for national securities markets."); *cf. Boyle* v. *United Tech. Corp.*, 487 U.S. 500, 504-05 (1988) (allowing preemption of state law

by federal common law where the interests at stake are "uniquely federal" in nature).

However, even if this Court analyzed the question of implied immunity under the preemption framework described in *ARC America*, the result would be the same. It is "[a] fundamental principle of the Constitution" that Congress has the power to preempt state law. *Crosby* v. *Nat'l Foreign Trade Council*, 530 U.S. 363, 372 (2000); *accord ARC America*, 490 U.S. at 100 ("It is accepted that Congress has the authority, in exercising its Article I powers, to pre-empt state law."). There is a "presumption against finding pre-emption of state law in areas traditionally regulated by the States," such as antitrust regulation, absent an express statement by Congress indicating such an intention. *ARC America*, 490 U.S. at 100. However, this presumption may be overcome in two instances:

> First, when Congress intends that federal law occupy a given field, state law in that field is pre-empted. Second, even if Congress has not occupied the field, state law is nevertheless pre-empted to the extent it actually conflicts with federal law, that is, when compliance with both state and federal law is impossible, or when the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."

ARC America, 490 U.S. at 100-01 (internal citations omitted) (quoting *Hines* v. *Davidowitz*, 312 U.S. 52, 67 (1941)).

Here, the presumption is overcome. As this Court held in its prior decision, "the SEC, both directly and through its pervasive oversight of the NASD and other SROs, either expressly permits the conduct alleged in the Sherman Act Complaint or has the power to regulate the conduct," and possesses a "unique mandate to balance competition with other market concerns." *IPO Antitrust Litig.*, 287 F. Supp. 2d at 512, 523. Thus, allowing plaintiffs to use various state

antitrust regulations to balkanize the national securities regulatory regime would "stand[] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines*, 312 U.S. at 67; *see* S. Rep. No. 94-75, at 13 (1975), *reprinted in* 1975 U.S.C.C.A.N. 179, 191 (noting that the SEC's "explicit obligation to balance . . . the competitive implications of self-regulatory and Commission action should not be viewed as requiring the Commission to justify that such actions be the least anti-competitive manner of achieving a regulatory objective. Rather, the Commission's obligation is to weigh competitive impact in reaching regulatory conclusions."); *Finnegan* v. *Campenau Corp.*, 915 F.2d 824, 825-26 (2d Cir. 1990) ("It is recognized that competition is the touchstone of the antitrust laws, while in the regulated securities industry the emphasis is on requiring full disclosure without otherwise changing the balance in the market for corporate control. Tension and at times conflict exist between these established public policies."); *In re Stock Exch. Options Trading Antitrust Litig.*, No. 1283, M-21-79 (RCC), 99 Civ. 962(RCC), 2001 WL 128325, at *10 (S.D.N.Y. Feb. 15, 2001), *aff'd* 317 F.3d 134 (2d Cir. 2003) (noting the Commission's mandate to "balanc[e] the benefits of competition against its other regulatory aims."). Accordingly, preemption is appropriate even under the *ARC America* framework.

CONCLUSION

For the reasons set forth above, the Sherman Act Plaintiffs' motion for partial reconsideration of this Court's November 3, 2003 Memorandum and Order is denied.

Dated: April 13, 2004
New York, New York

SO ORDERED:

/s/
WILLIAM H. PAULEY III
U.S.D.J.

Copies mailed to:

[counsel list omitted in printing]

No. 05-1157

In the Supreme Court of the United States

CREDIT SUISSE FIRST BOSTON LTD., ET AL.,
PETITIONERS

v.

GLEN BILLING, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

PAUL D. CLEMENT
Solicitor General
Counsel of Record

THOMAS O. BARNETT
Assistant Attorney General

THOMAS G. HUNGAR
Deputy Solicitor General

DAVID L. MEYER
Deputy Assistant Attorney General

DOUGLAS HALLWARD-DRIEMEIER
Assistant to the Solicitor General

CATHERINE G. O'SULLIVAN
NANCY C. GARRISON
JAMES J. FREDRICKS
Attorneys

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

RICHARD M. HUMES
Associate General Counsel
Securities and Exchange Commission
Washington, D.C. 20549
(202) 551-5100

QUESTIONS PRESENTED

1. Whether an antitrust complaint predicated on alleged collusive activity in the securities markets must, in order to survive a motion to dismiss on grounds of implied antitrust immunity, set forth allegations sufficient to support a reasonably grounded expectation that the plaintiff's claims do not rest on collaborative activities that are either permitted under the securities laws or inextricably intertwined with such permissible activities.

2. Whether conduct that is prohibited under the regulatory scheme governing public offerings of securities is categorically immune from liability under the federal antitrust laws because of the extensive regulatory authority exercised by the Securities and Exchange Commission over such conduct.

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In the Supreme Court of the United States

No. 05-1157

CREDIT SUISSE FIRST BOSTON LTD., ET AL.,
PETITIONERS

v.

GLEN BILLING, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is submitted in response to the order of this Court inviting the Solicitor General to express the views of the United States. In the view of the United States, the petition for a writ of certiorari should be granted.

STATEMENT

1. Petitioners include investment banks that underwrite initial public offerings (IPOs) of securities, and institutional investors. Respondent Billing and others filed a class action on behalf of persons who purchased certain IPO securities directly or in the aftermarket alleging that petitioners violated Section 1 of the Sherman Act, 15 U.S.C. 1 (Supp. IV 2004). The overarching theory of respondents' complaint, set forth under the heading "Summary of Allegations," is that petitioners agreed "to require from customers consideration in addition to the underwriters' discount * * * for allocations of shares of initial public offerings of certain technology-

related companies * * * and to inflate the aftermarket prices for such Class Securities." Consolidated Amended Class Action Complaint ¶ 1 (Jan. 2, 2002) (Am. Compl.).[1] Respondents allege in general terms that petitioners agreed to impose tie-in arrangements—*i.e.*, that they required IPO customers to pay consideration in addition to the stated offering price for IPO securities, including the payment of inflated commissions on other securities or "commitments to purchase other, less attractive securities." *Id.* ¶¶ 4(a), 6. In addition, petitioners are alleged to have agreed to require "laddering" arrangements—a form of tie-in under which, "in order to obtain IPO shares of a Class Security, customers had to place bids for and/or purchase quantities of such Class Security in the aftermarket at prices above the IPO price." *Id.* ¶¶ 4(b), 7.

More particularly, respondents allege that petitioners "implemented their unlawful * * * agreement through and in connection with their agreements to combine together into underwriting syndicates." Am. Compl. ¶ 49. Petitioners are alleged to have "communicated and worked together as co-underwriters and members of underwriting syndicates" (with lead underwriters using the same co-underwriters repeatedly), "collaborated with one another in trade organizations" and "as members of the National Association of Securities Dealers, Inc.," "combined to create various joint ventures in the securities market," and had "meetings among their top investment bankers, legal officers and marketing managers." *Id.* ¶¶ 45-48, 50. Petitioners are further alleged to have

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[1] The Amended Complaint also alleged violations of state antitrust law. Am. Compl. ¶¶ 84-109. Respondent Pfeiffer's separate class action complaint on behalf of aftermarket purchasers alleged that "the underwriter defendants paid bribes to, or accepted bribes from, the institutional defendants, in a course of conduct designed to inflate the price of particular securities," in violation of Section 2(c) of the Robinson-Patman Act, 15 U.S.C. 13(c). Pet. App. 18a-19a. The focus of this brief, like that of the court of appeals, is the Billing complaint, and references herein to the "complaint" are to the amended complaint filed in that action.

hosted "road shows" and conducted other communications with customers before the IPOs, during which petitioners, "at times jointly, made inquiries of customers or others interested in purchasing Class Securities concerning the number of shares that such person would be willing to purchase in the aftermarket and the prices such person would be willing to pay for such shares." *Id.* ¶ 54. The complaint also alleges that petitioners agreed to disclose to each other the identities of their respective IPO customers and to share data about them, including their trades, "[i]n order to monitor whether the customers complied with the preconditions to receiving allocations." *Id.* ¶ 56.

2. The district court granted petitioners' motion to dismiss the complaints under Rule 12(b)(6), Fed. R. Civ. P., on implied immunity grounds; it did not reach petitioners' arguments that respondents lacked standing and that the complaints failed adequately to allege any antitrust offenses. Pet. App. 72a-122a. The court held that "the [Securities and Exchange Commission (SEC)] explicitly permits much of the conduct alleged" in the complaint, which it described as "a general indictment of the syndicate system" authorized by the securities laws. *Id.* at 86a, 89a; see *id.* at 86a-93a. The court did not, however, limit its dismissal to those claims that were premised on authorized conduct, nor did the court give respondents an opportunity to replead their complaint to specify that their claims are based on conduct that is neither permitted by the securities laws nor inextricably intertwined with such conduct. The district court recognized that the "tie-in, laddering and other aftermarket agreements alleged" in the complaint are prohibited under the securities regulatory scheme, but it concluded that even such conduct enjoyed blanket immunity from antitrust liability in light of the SEC's "broad general authority to regulate IPO allocation and underwriter commission practices." *Id.* at 94a, 103a. The court

dismissed the complaint "with prejudice as against all defendants." *Id.* at 121a.

3. The court of appeals vacated and remanded for further proceedings consistent with its opinion. Pet. App. 1a-71a. The court acknowledged that the underwriting syndicate process, including certain types of manipulations "deemed 'stabilizing' activities," is permitted under the securities laws. *Id.* at 9a. But because the complaint also alleged "tie-in" and "laddering," conduct that the SEC classifies as unlawful manipulation, *id.* at 13a-16a, the court of appeals held that the "heart of the alleged anticompetitive behavior finds no shelter in the securities laws." *Id.* at 4a.[2]

The court of appeals recognized "the guiding principle that, where possible, 'the proper approach'" to the question of antitrust immunity "is an analysis which reconciles the operation of both statutory schemes with one another rather than holding one completely ousted." Pet. App. 49a-50a (quoting *National Gerimed. Hosp. & Gerontology Ctr.* v. *Blue Cross*, 452 U.S. 378, 392 (1981), and *Silver* v. *NYSE*, 373 U.S. 341, 357 (1963)). Under that principle, the court concluded, implied immunity may be found only in two narrowly defined situations. *Id.* at 49a.

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[2] The district court and the court of appeals had requested the views of the SEC and the Department of Justice separately on the issue of implied antitrust immunity. The SEC argued in a letter brief that "antitrust immunity is appropriate in the intensely regulated area of registered offering underwriting to protect the effectiveness of the regulatory regime * * * even in some cases where it may not be clear that the Commission could (or ever would) authorize the specific conduct alleged by particular plaintiffs." Pet. App. 192a. The Department of Justice took the position in a letter brief that petitioners are "entitled to implied immunity for conduct expressly or implicitly approved by the securities laws or SEC regulations," but that "the allegations of tying and laddering—practices that are strictly prohibited under the securities laws and that the SEC has never permitted or proposed to permit—should not be dismissed on implied immunity grounds." *Id.* at 207a. See *id.* at 124a-158a. Neither filing below expressly urged the test advocated in this brief, which reflects the considered view of the United States.

First, the court held that "pervasive regulation" may warrant implied repeal if "the activities of [a self-regulatory organization (SRO)], extensively regulated by the SEC, are challenged as anticompetitive." Pet. App. 50a. When regulatory approval immunizes the underlying restraints, moreover, an SRO's "conduct enforcing those restraints" may acquire "a kind of derivative immunity." *Ibid.* (quoting *Phonetele, Inc.* v. *AT&T*, 664 F.2d 716, 729 (9th Cir. 1981) (Kennedy, J.), cert. denied, 459 U.S. 1145 (1983), and citing *United States* v. *National Ass'n of Sec. Dealers, Inc. (NASD)*, 422 U.S. 694 (1975)).

Second, the court held that implied immunity may be warranted when there is a "potential specific conflict" between "the antitrust laws prohibiting a specific activity * * * and a regulatory regime compelling or permitting that activity." Pet. App. 51a. Based on its analysis of this Court's decision in *Gordon* v. *NYSE*, 422 U.S. 659 (1975), the court identified five factors in potential conflict situations that inform the "touchstone" determination whether Congress intended to repeal the antitrust laws: "(1) congressional intent as reflected in legislative history and a statute's structure; (2) the possibility for conflicting mandates; (3) the possibility that application of the antitrust laws would moot a regulatory provision; (4) the history of agency regulation of the anticompetitive conduct; and (5) any other evidence indicating that the statute implies a repeal." Pet. App. 53a, 57a; *id.* at 51a-57a. The court of appeals rejected respondents' contention that "immunity applies to whatever conduct the SEC could permit under its regulatory regime" in favor of "a legal framework *more* favorable to plaintiffs than the doctrine they [or the United States] have pressed." *Id.* at 62a. Respondents had urged that the question respecting conflicting mandates was whether the SEC "could permit" the conduct, *ibid.*, and the United States had urged that the question was whether the conduct alleged in the complaint was "expressly or implicitly

approved by the securities laws or SEC regulations," *id.* at 207a. The court of appeals, in contrast, held that a "potential specific conflict" is a "necessary"—but not sufficient—"component of implied immunity," and "is simply the essential starting point" of the implied immunity analysis. *Id.* at 51a, 53a; see *id.* at 57a.

The court of appeals concluded that neither a pervasive regulation nor a specific conflict rationale justified the district court's order of dismissal. Pet. App. 60a-70a. In rejecting petitioners' pervasive-regulation argument and distinguishing *NASD*, the court of appeals noted that "the NASD and the SEC share a relationship that is quite different from SEC regulation of private business activities," and that the implied immunity in *NASD* was limited to activities that were approved by the SEC or that implemented approved conduct. *Id.* at 67a-70a.

The court of appeals also held, based on its analysis of the *Gordon* factors, that there was no potential for specific conflict between the antitrust and securities laws that warranted implied immunity for the conduct alleged in the complaint. Focusing on the complaint's allegations of tie-in and laddering agreements, the court noted that there is no legislative history suggesting an intent to immunize such conduct, nor would application of the antitrust laws to such conduct be inconsistent with or "render[] nugatory" any provision of the securities laws. Pet. App. 64a-66a. The court saw no "potential for irreconcilable mandates" because neither petitioners nor the SEC urged "the Commission's power to force tie-in conspiracies or to force underwriters to offer tie-in agreements linked to IPO allocations." *Id.* at 64a-65a.

The court of appeals recognized, Pet. App. 61a n.47, that "the complaint details a host of conduct recognized as legitimate by the SEC" but, rather than affirming dismissal of the complaint with respect to such conduct, the court treated the complaint's reliance on permissible conduct as presenting

only a question of the evidence upon which respondents could rely. It found "no basis for grounding the immunity analysis in evidentiary considerations," and viewed the answer to the immunity question as "not vary[ing] with different evidentiary strategies." *Ibid.* It "le[ft] to the district court the task of ensuring that defendants do not suffer prejudice from any evidence of their legitimate activities." *Ibid.* The court also noted that, "'just as regulatory context may in [some] cases serve as a basis for implied immunity, it may also be a consideration' in the application of antitrust law," such as by supporting application of the rule of reason. *Id.* at 58a (quoting *Verizon Commc'ns Inc.* v. *Law Offices of Curtis V. Trinko*, 540 U.S. 398, 412 (2004)).

Accordingly, the court of appeals rejected petitioners' implied immunity defense in its entirety, holding that "we find no [implied] repeal." Pet. App. 70a. The court vacated the district court's dismissal on immunity grounds and remanded for consideration of "alternate grounds to support the district court's dismissal." *Ibid.*

DISCUSSION

The interaction of the antitrust laws with the statutory scheme for regulating public offerings of securities raises difficult and important questions about the proper scope of implied antitrust immunity. The securities regulatory scheme authorizes a broad array of collaborative conduct that might otherwise violate the antitrust laws, and this Court has emphasized the need for a "proper reconciliation of the regulatory and antitrust statutes." *Gordon* v. *NYSE*, 422 U.S. 659, 685 (1975). Neither the approach of the district court nor that of the court of appeals adequately accommodates the interests of those two critically important statutory schemes. Whereas the district court's approach could potentially immunize even blatantly anticompetitive conduct that the securities laws and regulations specifically forbid, the court of appeals' decision fails to protect defendants against the prospect of having to

defend against costly antitrust litigation based on conduct that the securities laws permit, and even encourage.

Although the court of appeals acknowledged that conduct expressly or implicitly authorized under the securities statutes is immune from liability under the antitrust laws, it failed to recognize or give effect to the full scope of that immunity. The court focused its immunity analysis on the complaint's general allegations that petitioners engaged in tie-in and laddering activities that are unlawful under the securities regulatory regime. Recognizing that many of the complaint's more specific factual allegations of actions taken by petitioners in furtherance of their allegedly unlawful agreements detail collaborative conduct that is either specifically permitted under the securities laws or inextricably linked to such permitted conduct, the court treated that problem as an issue to be addressed solely as a matter of evidence. But a complaint's generalized allegations of conduct prohibited under the regulatory scheme should not preclude dismissal on immunity grounds if the complaint's allegations to that effect ultimately rest on collaborative activities that are either permitted under the securities laws or inextricably intertwined with such permitted activities, because such conduct is impliedly immune from antitrust liability. And to the extent the complaint is ambiguous whether the specific conduct on which respondents premise their broad allegations of illegal tie-ins and laddering is itself entitled to immunity, respondents should be required to re-plead to make clear that they are not relying on protected activities as a necessary component of their claim. By categorically rejecting petitioners' immunity defense and thereby foreclosing the district court on remand from dismissing on immunity grounds with leave to re-plead, the court of appeals failed to give adequate effect to the securities laws.

On the other hand, the sweeping immunity urged by petitioners and adopted by the district court fails to give adequate effect to the antitrust laws. Congress has not broadly immu-

nized all conduct that is arguably related to the initial public offering process or to other activity regulated by the SEC. The district court's dismissal of the complaint in its entirety and with prejudice, based on the SEC's "broad general authority to regulate IPO allocation and underwriter commission practices," Pet. App. 94a, is inconsistent with this Court's repeated rejection of "a blanket exemption" from antitrust law for all conduct regulated under another statutory scheme. *National Gerimed. Hosp. & Gerontology Ctr.* v. *Blue Cross*, 452 U.S. 378, 392 (1981). Thus, the court of appeals was correct to vacate the district court's dismissal of the complaint with prejudice.

The question of implied immunity at issue here is an important and recurring one, and this Court's guidance would resolve the continuing confusion in the lower courts about the proper manner in which to reconcile the antitrust laws and the securities laws. Whereas, in the view of the United States, petitioners are not entitled to the sweeping immunity they advocate, clarity on this matter is critical. It is of paramount importance that the capital formation process in this country not be undermined by the threat of treble damages liability based on conduct inextricably linked to the collaborative activities authorized and regulated by the SEC under the securities laws. The court of appeals' decision fails to give adequate protection against that threat. As a practical matter, moreover, absent review by this Court, the standards announced by the decision below will likely govern all, or nearly all, cases raising similar issues in the future, because venue in such suits will generally lie within the Second Circuit. In view of the significance of the issues, and the danger that permitting misdirected antitrust class actions to proceed could chill legitimate activity in our Nation's vitally important financial markets, the petition for a writ of certiorari should be granted.

I. THE COURT OF APPEALS FAILED TO AFFORD APPROPRIATE PROTECTION TO CONDUCT THAT IS INEXTRICABLY LINKED TO LEGITIMATE COLLABORATIVE UNDERWRITING ACTIVITY

The "proper approach" to a claim of antitrust immunity on the basis of another regulatory statute "is an analysis which reconciles the operation of both statutory schemes with one another rather than holding one completely ousted." *Silver* v. *NYSE*, 373 U.S. 341, 357 (1963). See Pet. App. 49a-50a (quoting same). Reconciling the strictures of the federal antitrust laws with federal regulatory policy is especially important when, as here, the regulatory scheme authorizes competitors to collaborate in ways that might otherwise violate the antitrust laws and provide a ready basis for alleging such violations. *Silver*, 373 U.S. at 360 (noting that the securities law's "policy of self-regulation" necessarily "contemplates that the Exchange will engage in restraints of trade which might well be unreasonable absent sanction" by the securities laws).

Applying the proper framework, the antitrust laws should be understood as having been impliedly repealed with respect to authorized collaboration among underwriters in the IPO process. The system of syndicated underwriting is "an essential means" by which underwriters manage and share risks in underwriting public securities offerings. Pet. App. 5a. It "inherently involves agreements and joint actions among potential competitors, including agreements about price that, but for the securities regulatory regime, would raise substantial antitrust concern." *Id.* at 192a.[3] Congress was well aware

[3] Among other things, the "lead underwriter in a syndicate must assess the appropriate issue quantity and pricing for the IPO," which is "a difficult task, in which the lead underwriter is aided in part by 'book building.'" Pet. App. 6a (citations omitted). As part of the authorized book building process, the underwriters discuss price and demand with the issuer and potential investors,

of the syndicated underwriting system when it enacted the Securities Act of 1933 and the Securities Exchange Act of 1934, and the legislative and regulatory history demonstrates that Congress chose regulation rather than prohibition. See generally *id.* at 4a-16a, 133a-136a. Collaborative activity in the formation and operation of underwriting syndicates must therefore be deemed immune from challenge under the antitrust laws.

Moreover, contrary to the view seemingly expressed by the court of appeals, that immunity encompasses activities that are directly related to and cannot practically be separated from authorized conduct. See *NASD*, 422 U.S. at 733-734 (holding immune a horizontal agreement to implement approved vertical distribution rules).[4] Failure to recognize immunity for activities that are inextricably intertwined with permissible collaborative conduct could effectively vitiate the immunity for the authorized conduct and thus conflict with the regulatory scheme.[5]

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agree on the size and pricing of the offering, and decide how to allocate the shares. See generally *id.* at 4a-16a.

[4] Courts apply an analogous approach to immunity in other contexts. Under the *Noerr-Pennington* doctrine, for example, petitioning the government to take anticompetitive action does not violate the antitrust laws. A media campaign intended to influence the government is also immune, although its incidental effects may directly injure competitors. See *Eastern R.R. Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127, 142-143 (1961); *United Mine Workers* v. *Pennington*, 381 U.S. 657, 669-670 (1965). See also *Allied Tube & Conduit Corp.* v. *Indian Head, Inc.*, 486 U.S. 492, 499 (1988). Similarly, a prosecutor's governmental immunity from civil damages extends to activities "intimately associated with the judicial phase of the criminal process." *Imbler* v. *Pachtman*, 424 U.S. 409, 430 (1976). See also *Nixon* v. *Fitzgerald*, 457 U.S. 731, 756 (1982) (absolute presidential immunity for acts within the "outer perimeter" of president's official responsibility).

[5] Of course, the mere fact that conduct violating the antitrust laws occurs in connection with permissible and immune conduct is not sufficient to require dismissal on immunity grounds. For example, competitors who agreed to fix prices cannot claim immunity under *Noerr* merely because they also had

The decision of the court of appeals fails to make sufficient accommodation for the securities laws' policy of encouraging certain types of collaborative activity. As the government's amicus filings in the lower courts emphasized, many of the more specific factual allegations in the complaint describe accepted practices of underwriters that the SEC permits, and in some instances encourages, as part of the capital formation process—including combining into underwriting syndicates; collaborating as members of trade associations and exchanges; agreeing that the lead underwriter will distribute all the shares and that all syndicate members will share in the underwriters' discount; holding meetings of investment bankers, legal officers, and market makers; and disclosing information about each underwriter's IPO customers. See Pet. App. 154a-155a, 177a, 206a-207a (referring, in particular, to specific conduct alleged in Am. Compl. ¶¶ 38, 39, 45-48, 56, 62). That conduct is immune from antitrust scrutiny, as is any related conduct that cannot practicably be separated from it.

Although the court of appeals recognized that "the complaint details a host of conduct recognized as legitimate by the SEC," Pet. App. 61a n.47, it did not treat the presence of such allegations as raising a question of immunity. Indeed, the court erroneously held that the implied immunity issue is conclusively resolved in respondents' favor merely because the complaint alleges, in rather conclusory fashion, certain conduct that is forbidden by the securities laws. See *id.* at 70a ("find[ing] no repeal" of the antitrust laws and remanding only for consideration of "alternate grounds" for dismissal).

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legitimate discussions about an industry position on price control legislation at the same meeting. See *In Re Brand Name Prescription Drugs Antitrust Litig.*, 186 F.3d 781, 788-789 (7th Cir. 1999), cert. denied, 528 U.S. 1181 (2000). Rather, the court must inquire whether the challenged conduct can practicably be separated from, or is instead inextricably intertwined with, the permissible conduct.

The court treated the presence of allegations relating to legitimate collaboration as raising only questions regarding what *evidence* respondents could rely upon to support their antitrust claims. See *id.* at 61a n.47 ("[W]e leave to the district court the task of ensuring that defendants do not suffer prejudice from any evidence of their legitimate activities.").

The problem presented by the complaint's reliance on protected conduct is more fundamental than the court of appeals appreciated. When a complaint merely combines a conclusory allegation that the defendants engaged in impermissible anticompetitive conduct with more detailed allegations of collaborative conduct authorized by a regulatory scheme—or activities inextricably intertwined with such conduct—the complaint does not suffice to overcome the immunity defense. Rather, the complaint must allege facts providing concrete notice and giving rise to a reasonably grounded expectation, see *Dura Pharms., Inc.* v. *Broudo*, 544 U.S. 336, 347 (2005), that the alleged antitrust offense can be established without relying on activities that are authorized under the regulatory scheme or inextricably intertwined with such immune activities. The district court must, therefore, use its "power to insist upon some specificity in pleading before allowing a potentially massive factual controversy to proceed." *Associated Gen. Contractors of Cal., Inc.* v. *California State Council of Carpenters*, 459 U.S. 519, 528 n.17 (1983).[6] And it should not permit discovery to go forward as a fishing

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[6] The district court has "inherent power to narrow the issues for trial and require the plaintiff to state with more specificity the factual allegations supporting the claim." *Marx* v. *Gumbinner*, 855 F.2d 783, 792 (11th Cir. 1988). The court may also grant motions for more definite statements or to strike immaterial allegations. See Fed. R. Civ. P. 12(e) and (f); *Elliott* v. *Perez*, 751 F.2d 1472, 1482 (5th Cir. 1985). See also *United States* v. *Georgia*, 126 S. Ct. 877, 882 (2006) (after complaint is amended, the lower courts can determine which aspects of the alleged conduct would violate the Constitution or the relevant statute and the extent to which that conduct is protected by sovereign immunity).

expedition based on conclusory or ambiguous allegations that focus on protected conduct.[7] See generally U.S. Br., *Bell Atlantic Corp.* v. *Twombly*, 126 S. Ct. 2965 (2006) (No. 05-1126).

In this case, it is particularly difficult to discern whether respondents have adequately pleaded non-immune anticompetitive conduct sufficient to overcome the immunity defense, because the allegations of forbidden tie-in and laddering agreements are largely confined to more conclusory assertions in the background section of the complaint, whereas the more specific factual allegations concerning the alleged unlawful agreements detail conduct that is (or might be) immune.

For example, in their "Summary of Allegations," Am. Compl. 1, respondents allege that petitioners "agree[d] to require that, in order to obtain IPO shares of a Class Security, customers had to place bids for and/or purchase quantities of such Class Security in the aftermarket at prices above the IPO price in order to systematically and significantly inflate the after-market prices of IPOs—a practice known as 'laddering.'" *Id.* ¶ 7. However, in the section of the complaint headed "The Making and Implementation of Defendants' Unlawful Agreement," *id.* at 19, which lays out the specific acts petitioners are alleged to have taken in connection with the unlawful agreements, the more specific allegation regarding "laddering" is that during "road shows" and other communications with customers before the IPOs, petitioners "at times jointly, made inquiries of customers or others interested in purchasing Class Securities concerning the number

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[7] If the complaint is not dismissed outright, the court should exercise the power to manage this complex action, see Fed. R. Civ. P. 16(c)(12); to limit the scope and intrusiveness of discovery, see Rule 26; to grant summary judgment at any time, see Rule 56(a); and to exclude evidence of protected conduct as irrelevant or unduly prejudicial, see Fed. R. Evid. 402, 403; cf., *e.g.*, *United States Football League* v. *NFL*, 842 F.2d 1335, 1374-1375 (2d Cir. 1988) (evidence of lobbying subject to *Noerr-Pennington* doctrine properly excluded from antitrust case because more prejudicial than probative).

of shares that such person would be willing to purchase in the aftermarket and the prices such person would be willing to pay for such shares." *Id.* ¶ 54. That allegation is sufficiently vague that it encompasses permissible book-building conduct between underwriters and investors that the SEC has specifically approved as important in determining the size and price of the offering as well as the allocation of shares, based on understanding long-term investor interest in and valuation of the company. See Pet. App. 227a-228a (SEC's April 2005 guidance specifically authorizing inquiries "as to customers' desired future position in the longer term (for example, three to six months) and the price or prices at which the customer might accumulate that position," while clarifying that "inquir[ing] whether the customer intends to place orders in the immediate aftermarket, and if so, at what prices and quantities" is prohibited as an impermissible tie-in).

The court of appeals should have undertaken, or directed the district court to undertake on remand, a "fairly fact-specific inquiry," *Friedman* v. *Salomon/Smith Barney, Inc.*, 313 F.3d 796, 799 (2d Cir. 2002), cert. denied, 540 U.S. 822 (2003), to determine whether the allegations of non-immune conduct in respondents' complaint impermissibly rest on the complaint's more specific assertions of legitimate and immune conduct. In view of the complaint's extensive reliance on allegations of immune conduct, the court of appeals erred in categorically rejecting petitioners' immunity defense.

II. PETITIONERS ERR IN CONTENDING THAT IMPLIED IMMUNITY SHIELDS ALL CONDUCT RELATING TO INITIAL PUBLIC OFFERINGS

Although, as discussed above, the court of appeals failed to give adequate protection to collaborative conduct that is permitted under the securities laws, the district court and petitioners are also wrong in their view that all conduct connected with initial public offerings is impliedly immune from antitrust liability because the SEC exercises "pervasive" reg-

ulatory authority over it. See Pet. 5, 9-10, 18, 21-24, 27. As this Court has instructed, "a cardinal principle of construction [is] that repeals by implication are not favored," *Silver*, 373 U.S. at 357 (quoting *United States* v. *Borden Co.*, 308 U.S. 188, 198 (1939)), and "can be justified only by a convincing showing of clear repugnancy between the antitrust laws and the regulatory system," *NASD*, 422 U.S. at 719-720; *National Gerimed.*, 452 U.S. at 388. "Repeal is to be regarded as implied only if necessary to make the [regulatory statute] work, and even then only to the minimum extent necessary." *Silver*, 373 U.S. at 357.[8] Contrary to petitioners' theory, therefore, the Court has rejected the view that all conduct regulated under another statutory scheme enjoys "a blanket exemption" from antitrust law. *National Gerimed.*, 452 U.S. at 392. See also *Otter Tail Power Co.* v. *United States*, 410 U.S. 366, 372 (1973) ("[a]ctivities which come under the jurisdiction of a regulatory agency nevertheless may be subject to scrutiny under the antitrust laws").[9]

Notably, the Court did not apply petitioners' sweeping rule of implied repeal in either *Gordon* or *NASD*, each of which involved conduct regulated by the SEC. In *Gordon*, private plaintiffs sought treble damages for the fixing of commissions pursuant to exchange rules. The Court did not hold that the SEC's regulatory authority was so "pervasive" that it impliedly repealed all antitrust liability. 422 U.S. at 688-

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[8] Indeed, even express statutory exemptions are narrowly construed. See, *e.g.*, *Carnation Co.* v. *Pacific Westbound Conference*, 383 U.S. 213 (1966).

[9] In *Otter Tail*, there was no implied immunity because "nothing in the legislative history [of the Federal Power Act] * * * reveal[ed] a [congressional] purpose to insulate electric power companies from the operation of the antitrust laws." 410 U.S. at 373-374. Similarly, in *United States* v. *Philadelphia National Bank*, 374 U.S. 321 (1963), the Court held that the Bank Merger Act of 1960, which required the Comptroller of the Currency to review and approve certain bank mergers under a public interest standard, did not provide antitrust immunity for approved mergers because there was no evidence that Congress intended to oust antitrust enforcement. *Id.* at 352.

689. Rather, the Court focused on the fact that Congress had specifically granted the SEC "the power to fix and insure 'reasonable' rates" of commission, *id.* at 666, and the SEC, which had "thoroughly exercised its supervisory powers" over the system of fixed commissions, *id.* at 668, had effectively authorized the use of fixed rates during the time period at issue in the complaint. *Id.* at 667-675, 689-690. As the Court explained, the SEC's approval of fixed rates was "not significantly different" from "an affirmative order to the exchanges to follow fixed rates." *Id.* at 689 n.13. Fixed commissions were not prohibited by the SEC until 1975, several years *after* the suit was filed. *Id.* at 660, 675.

Similarly, in *NASD* the Court reviewed the legislative history of the securities statute and found that the challenged vertical restrictions on mutual fund sales and distributions were "among the kinds of restrictions Congress contemplated when it" granted the SEC authority to approve such rules. 422 U.S. at 721. The SEC exercised a significant oversight function, and its decision not to prohibit the restrictions reflected the Commission's approval of those restrictions and of the challenged NASD rules and interpretations. *Id.* at 728, 733. That authorization, contemplated by Congress, could not be reconciled with application of the antitrust laws, under which the restrictions would have been illegal per se. *Id.* at 729, 733. Although the efforts of NASD members to encourage the kinds of restraints at issue were not themselves specifically required or approved, that conduct also was immune because it was "designed to encourage * * * precisely the restriction that the SEC consistently ha[d] approved pursuant to [statute] for nearly 35 years." *Id.* at 733. Certainly, nothing in *Gordon* or *NASD* supports petitioners' view that anticompetitive conduct that is and always has been forbidden under the securities laws is nonetheless categorically immune from liability under the antitrust laws.

Petitioners' ultimate argument (Pet. 27-28) is that the Court should, as an exercise of judicial policymaking, confer broad antitrust immunity for conduct relating to the securities markets because, in petitioners' view, the prospect of treble damages awards by federal juries applying the antitrust laws will unduly disrupt the capital formation process. While those concerns are legitimate and counsel in favor of both extending immunity beyond the scope acknowledged by the court of appeals and carefully scrutinizing complaints, see pp. 10-15, *supra*, to the extent petitioners seek a blanket immunity, such arguments are properly directed to Congress, not the courts. Congress has enacted various express antitrust exemptions, and has placed restrictions on certain types of actions under the securities laws,[10] but as yet it has not chosen to confer the blanket immunity from antitrust liability that petitioners urge. Congress, moreover, has the flexibility to tailor express immunity to serve the ends of both the securities and antitrust laws, for example, by conferring immunity from treble damages suits while allowing the Justice Department to bring enforcement actions. As the court of appeals correctly recognized (Pet. App. 70a), it is not the place of the courts to confer broad immunity from enforcement of the antitrust laws absent evidence that Congress intended that result.[11]

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[10] See Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, 109 Stat. 737; Securities Litigation Uniform Standards Act of 1998, Pub. L. No. 105-353, 112 Stat. 3227.

[11] The Department of Justice cooperates with the SEC to identify and address potential violations of the antitrust laws, as well as related competitive concerns under the securities laws. The Department has brought antitrust enforcement actions against, for example, anticompetitive agreements related to conventions for quoting stock prices, see *Stipulation and Order and Competitive Impact Statement*, United States *v.* Alex. Brown & Sons, Inc., 61 Fed. Reg. 40,439 (1996), and hedge fund trading of U.S. Treasury notes, see *Proposed Final Judgment and Competitive Impact Statement*, United States *v.* Steinhardt Mgmt. Co., 60 Fed. Reg. 3263-3264 (1995). The Department also

III. THIS COURT SHOULD PROVIDE THE LOWER COURTS WITH GUIDANCE ON HOW TO RECONCILE THE ANTITRUST AND SECURITIES LAWS

This case involves the reconciliation of two federal statutes critical to the efficient functioning of our economy. The federal antitrust laws seek to further "our fundamental national economic policy" of competition, *United States* v. *Philadelphia Nat'l Bank*, 374 U.S. 321, 372 (1963), while the securities laws regulate and ensure the integrity of the engine of capital formation.

A standard permitting antitrust actions to proceed on the basis of alleged conduct that cannot practicably be separated from legitimate collaborative activities approved under the regulatory regime governing public securities offerings could undercut critical national regulatory policies and interfere with the capital formation process. The decision below threatens just such a result. The court of appeals erred by failing to grant implied immunity with respect to conduct inextricably intertwined with approved conduct and by rejecting petitioners' immunity defense without regard to whether respondents' conclusory allegations of unlawful conduct ultimately rest on the complaint's more particular allegations of conduct that is authorized or even encouraged by the SEC. On the other hand, the sweeping antitrust immunity endorsed by the district court and urged on this Court by petitioners would oust not only private treble damages actions but government antitrust enforcement from the securities industry, despite the absence of any evidence that Congress intended such a drastic result.

The Court could provide much-needed certainty in this critical area by granting the petition and clarifying the proper

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investigates joint ventures and acquisitions in the securities industry. The Department's enforcement of antitrust laws in the securities context has saved consumers billions of dollars.

standard of immunity. That action, combined with the Court's clarification of the pleading standards in *Twombly*, could do much to provide essential guidance in this area of the law. In sum, the Court should grant certiorari so that these two critically important statutory schemes will be reconciled in a manner that gives effect to each, "rather than holding [either] one completely ousted," *National Gerimed.*, 452 U.S. at 392.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

PAUL D. CLEMENT
Solicitor General

THOMAS O. BARNETT
Assistant Attorney General

THOMAS G. HUNGAR
Deputy Solicitor General

DAVID L. MEYER
Deputy Assistant Attorney General

DOUGLAS HALLWARD-DRIEMEIER
Assistant to the Solicitor General

CATHERINE G. O'SULLIVAN
NANCY C. GARRISON
JAMES J. FREDRICKS
Attorneys

RICHARD M. HUMES
Associate General Counsel
Securities and Exchange Commission

NOVEMBER 2006

No. 05-1157

In the Supreme Court of the United States

CREDIT SUISSE SECURITIES (USA) LLC, FKA CREDIT SUISSE FIRST BOSTON LLC., ET AL., PETITIONERS

v.

GLEN BILLING, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING VACATUR

PAUL D. CLEMENT
Solicitor General
Counsel of Record

THOMAS O. BARNETT
Assistant Attorney General

THOMAS G. HUNGAR
Deputy Solicitor General

DAVID L. MEYER
Deputy Assistant Attorney General

DOUGLAS HALLWARD-DRIEMEIER
Assistant to the Solicitor General

CATHERINE G. O'SULLIVAN
NANCY C. GARRISON
JAMES J. FREDRICKS
Attorneys

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

RICHARD M. HUMES
Associate General Counsel
Securities and Exchange Commission
Washington, D.C. 20549

WILLIAM BLUMENTHAL
General Counsel
Federal Trade Commission
Washington, D.C. 20580

QUESTIONS PRESENTED

1. Whether an antitrust complaint predicated on alleged collusive activity in the securities markets must, in order to survive a motion to dismiss on grounds of implied antitrust immunity, set forth allegations sufficient to support a reasonably grounded expectation that the plaintiff's claims do not rest on collaborative activities that are either permitted under the securities laws or inextricably intertwined with such permissible activities.

2. Whether conduct that is prohibited under the regulatory scheme governing public offerings of securities is categorically immune from liability under the federal antitrust laws because of the extensive regulatory authority exercised by the Securities and Exchange Commission over such conduct.

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Alexander v. *National Farmers Org.*, 687 F.2d 1173 (8th Cir. 1982), cert. denied, 489 U.S. 1081 (1989) 19

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Associated Gen. Contractors of Cal., Inc. v. *California State Council of Carpenters*, 459 U.S. 519 (1983) 25
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Brand Name Prescription Drugs Antitrust Litig., In re, 186 F.3d 781 (7th Cir. 1999), cert. denied, 528 U.S. 1181 (2000) 19
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Dura Pharms., Inc. v. *Broudo*, 544 U.S. 336 (2005) 25
Eastern R.R. Presidents Conference v. *Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961) 9, 14, 16
Feminist Women's Health Ctr. v. *Mohammad*, 586 F.2d 530 (5th Cir. 1978), cert. denied, 444 U.S. 924 (1979) 29
FTC v. *Superior Court Trial Lawyers Ass'n*, 493 U.S. 411 (1990) 18
Gordon v. *NYSE*, 422 U.S. 659 (1975) 6, 8, 11, 17
Matsushita Elec. Indus. Co. v. *Zenith Radio Corp.*, 475 U.S. 574 (1986) 14
National Gerimed. Hosp. & Gerontology Ctr. v. *Blue Cross*, 452 U.S. 378 (1981) 5, 9, 11, 16, 29
Otter Tail Power Co. v. *United States*, 410 U.S. 366 (1973) 16, 17

Cases–Continued: Page

Phonetele, Inc. v. *AT&T*, 664 F.2d 716 (9th Cir. 1981), cert. denied, 459 U.S. 1145 (1983) 13
Riley v. *National Fed'n of the Blind*, 487 U.S. 781 (1988) 14
Silver v. *NYSE*, 373 U.S. 341 (1963) 5, 8, 11, 16
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United States Football League v. *NFL*, 842 F.2d 1335 (2d Cir. 1988) 29
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Rule 402 29
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1 Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* (2d ed. 2000) 29
Commission Guidance Regarding Prohibited Conduct in Connection with IPO Allocations, 70 Fed. Reg. (2005):
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p. 19,676 ..... 20, 27
James Wm. Moore et al., *Moore's Federal Practice* (3d ed. 2006) 25
Proposed Final Judgment and Competitive Impact Statement, United States *v.* Steinhardt Mgmt. Co., 60 Fed. Reg. 3263-3264 (1995) 23
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Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* (3d ed. 2004) 25, 29

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INTEREST OF THE UNITED STATES

This case involves the relationship of two federal statutory regimes that are critical to the efficient functioning of our economy. The federal antitrust laws seek to further "our fundamental national economic policy" of competition, *United States* v. *Philadelphia Nat'l Bank*, 374 U.S. 321, 372 (1963), while the securities laws regulate and preserve the integrity of the capital formation process. The United States has a substantial interest in ensuring that those two critically important statutory schemes are reconciled in a manner that gives effect to both, "rather than holding [either] one completely ousted," *National Gerimed. Hosp. & Gerontology Ctr.* v. *Blue Cross*, 452 U.S. 378, 392 (1981). The Court recognized

those important federal interests in inviting the views of the United States at the certiorari stage.

STATEMENT

1. Respondent Billing and others filed this putative class action on behalf of themselves and other persons who purchased shares of certain companies through initial public offerings (IPOs) or in the immediate aftermarket following those IPOs. Respondents' suit alleges that petitioners, investment banks that underwrite IPOs as well as various institutional investors, violated Section 1 of the Sherman Act, 15 U.S.C. 1 (Supp. IV 2004). The overarching theory of respondents' complaint, set forth under the heading "Summary of Allegations," is that petitioners agreed among themselves "to require from customers consideration in addition to the underwriters' discount * * * for allocations of shares of initial public offerings of certain technology-related companies * * * and to inflate the aftermarket prices for such Class Securities." Consolidated Amended Class Action Complaint ¶ 1 (Jan. 2, 2002) (Am. Compl.).[1]

Respondents allege, in this "Summary" section, that petitioners entered into an agreement to impose tie-in arrangements—*i.e.*, that they would require IPO customers to pay consideration in addition to the stated offering price for IPO securities, including the payment of inflated commissions on other securities or "commitments to purchase other, less at-

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[1] The Amended Complaint also alleges violations of state antitrust law. Am. Compl. ¶¶ 84-109. Respondent Pfeiffer's separate class action complaint on behalf of aftermarket purchasers alleges that "the underwriter defendants paid bribes to, or accepted bribes from, the institutional defendants, in a course of conduct designed to inflate the price of particular securities," in violation of Section 2(c) of the Robinson-Patman Act, 15 U.S.C. 13(c). Pet. App. 18a-19a. Like the court of appeals' opinion, this brief focuses on the Billing complaint, and references herein to the "complaint" are to the amended complaint filed in that action.

tractive securities." Am. Compl. ¶¶ 4(a), 6. In addition, the complaint alleges that petitioners agreed to require "laddering" arrangements—a form of tie-in under which, "in order to obtain IPO shares of a Class Security, customers had to place bids for and/or purchase quantities of such Class Security in the aftermarket at prices above the IPO price." *Id.* ¶¶ 4(b), 7.

In another section of respondents' complaint, under the heading "The Making and Implementation of Defendants' Unlawful Agreement," Am. Compl. 19, respondents specify the particular acts that petitioners are alleged to have taken as part of the asserted agreement. Respondents allege that petitioners "implemented their unlawful * * * agreement through and in connection with their agreements to combine together into underwriting syndicates." *Id.* ¶ 49. Petitioners are alleged to have "communicated and worked together as co-underwriters and members of underwriting syndicates" (with lead underwriters using the same co-underwriters repeatedly), "collaborated with one another in trade organizations" and "as members of the National Association of Securities Dealers, Inc.," "combined to create various joint ventures in the securities market," and had "meetings among their top investment bankers, legal officers and marketing managers." *Id.* ¶¶ 45-48, 50. Petitioners are further alleged to have hosted "road shows" and conducted other communications with customers before the IPOs, during which petitioners, "at times jointly, made inquiries of customers or others interested in purchasing Class Securities concerning the number of shares that such person would be willing to purchase in the aftermarket and the prices such person would be willing to pay for such shares." *Id.* ¶ 54. The complaint also alleges that petitioners agreed to disclose to each other the identities of their respective IPO customers and to share data about them, including their trades, "[i]n order to monitor whether

the customers complied with the preconditions to receiving allocations." *Id.* ¶ 56.

2. Petitioners moved to dismiss the complaint on the ground that the regulatory scheme established by the securities laws impliedly precludes application of the antitrust laws to petitioners' conduct in connection with the issuance of securities through underwriting syndicates. The district court granted the motion. Pet. App. 72a-122a.[2] The court held that "the [Securities and Exchange Commission (SEC)] explicitly permits much of the conduct alleged" in the complaint, which it described as "a general indictment of the syndicate system" authorized by the securities laws. *Id.* at 86a, 89a; see *id.* at 86a-93a. The court did not, however, limit its dismissal to those claims or allegations that were premised on permitted conduct. Nor did the court give respondents an opportunity to re-plead their claims based solely on conduct that is neither permitted by the securities laws nor inextricably intertwined with such conduct. The district court recognized that the "tie-in, laddering and other aftermarket agreements alleged" in the complaint are prohibited under the securities regulatory scheme, but it concluded that even such conduct enjoyed blanket immunity from antitrust liability in light of the SEC's "broad general authority to regulate IPO allocation and underwriter commission practices." *Id.* at 94a, 103a. The court dismissed the complaint "with prejudice as against all defendants." *Id.* at 121a.

3. The court of appeals vacated and remanded for further proceedings consistent with its opinion. Pet. App. 1a-71a. The court acknowledged that the underwriting syndicate process, including certain types of manipulations "deemed 'stabilizing' activities," is permitted under the securities laws. *Id.* at

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[2] The district court did not reach petitioners' alternative arguments that respondents lacked standing and that the complaints failed to allege any antitrust offenses. See Pet. App. 76a.

9a. But because the complaint also alleged "tie-in" and "laddering," conduct that the SEC classifies as unlawful manipulation, *id.* at 13a-16a, the court of appeals held that the "heart of the alleged anticompetitive behavior finds no shelter in the securities laws." *Id.* at 4a.[3]

The court of appeals recognized "the guiding principle that, where possible, 'the proper approach'" to the question of implied antitrust immunity "is an analysis which reconciles the operation of both statutory schemes with one another rather than holding one completely ousted." Pet. App. 49a-50a (quoting *National Gerimed. Hosp. & Gerontology Ctr.* v. *Blue Cross*, 452 U.S. 378, 392 (1981), and *Silver* v. *NYSE*, 373 U.S. 341, 357 (1963)). Under that principle, the court concluded, implied antitrust immunity may be found only in two narrowly defined situations. *Id.* at 49a.

First, the court held that "pervasive regulation" by the securities laws may warrant a finding of implied antitrust immunity if "the activities of [a self-regulatory organization (SRO)], extensively regulated by the SEC, are challenged as anticompetitive." Pet. App. 50a. Second, the court held that

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[3] The district court and the court of appeals had requested the views of the SEC and the Department of Justice separately on the issue of implied antitrust immunity. The SEC argued in a letter brief that "antitrust immunity is appropriate in the intensely regulated area of registered offering underwriting to protect the effectiveness of the regulatory regime * * * even in some cases where it may not be clear that the Commission could (or ever would) authorize the specific conduct alleged by particular plaintiffs." Pet. App. 192a. The Department of Justice took the position in a letter brief that petitioners are "entitled to implied immunity for conduct expressly or implicitly approved by the securities laws or SEC regulations," but that "the allegations of tying and laddering—practices that are strictly prohibited under the securities laws and that the SEC has never permitted or proposed to permit—should not be dismissed on implied immunity grounds." *Id.* at 207a. See *id.* at 124a-158a. Neither filing below expressly urged the test advocated in this brief, which reflects the considered view of the United States.

implied immunity may also be warranted when there is a "potential specific conflict" between "the antitrust laws prohibiting a specific activity * * * and a regulatory regime compelling or permitting that activity." *Id.* at 51a. Based on its analysis of this Court's decision in *Gordon* v. *NYSE*, 422 U.S. 659 (1975), the court identified five factors in potential conflict situations that inform the "touchstone" determination whether Congress intended to repeal the antitrust laws: "(1) congressional intent as reflected in legislative history and a statute's structure; (2) the possibility for conflicting mandates; (3) the possibility that application of the antitrust laws would moot a regulatory provision; (4) the history of agency regulation of the anticompetitive conduct; and (5) any other evidence indicating that the statute implies a repeal." Pet. App. 53a, 57a; *id.* at 51a-57a.

Respondents had urged that a conflict would exist if the SEC "could permit" the challenged conduct (Pet. App. 62a), and the Department of Justice had argued that the principal question was whether the conduct alleged in the complaint was "expressly or implicitly approved by the securities laws or SEC regulations," *id.* at 207a. The court of appeals rejected the contention that "immunity applies to whatever conduct the SEC could permit under its regulatory regime" in favor of "a legal framework *more* favorable to plaintiffs than the doctrine they [or the United States] have pressed." *Id.* at 62a. The court held that a "potential specific conflict" is a "necessary"—but not sufficient—"component of implied immunity," and "is simply the essential starting point" of the implied immunity analysis. *Id.* at 51a, 53a; see *id.* at 57a. The court determined that further inquiry, based on "the insights of the *Gordon* opinion," is still necessary to determine "whether there is any evidence of an implicit congressional intent to repeal the antitrust laws." *Id.* at 53a.

The court of appeals concluded that neither a pervasive regulation nor a specific conflict rationale justified the district court's order of dismissal in this case. Pet. App. 60a-70a. In rejecting petitioners' pervasive-regulation argument, the court of appeals noted that "the NASD and the SEC share a relationship that is quite different from SEC regulation of private business activities," and that the implied immunity in *United States* v. *National Ass'n of Sec. Dealers, Inc.*, 422 U.S. 694 (1975), was limited to activities that were approved by the SEC or that implemented approved conduct. Pet. App. 67a-70a.

The court of appeals also held, based on its analysis of the *Gordon* factors, that there was no potential for specific conflict between the antitrust and securities laws. Focusing on the complaint's allegations of tie-in and laddering agreements, the court noted that there is no legislative history suggesting an intent to immunize such conduct, nor would application of the antitrust laws to such conduct be inconsistent with or "render[] nugatory" any provision of the securities laws. Pet. App. 64a-66a. The court saw no "potential for irreconcilable mandates" because neither petitioners nor the SEC urged "the Commission's power to force tie-in conspiracies or to force underwriters to offer tie-in agreements linked to IPO allocations." *Id.* at 64a-65a.

The court of appeals recognized, Pet. App. 61a n.47, that "the complaint details a host of conduct recognized as legitimate by the SEC" but, rather than affirming dismissal of the complaint with respect to such conduct, the court treated the complaint's reliance on permissible conduct as presenting only a question of the evidence upon which respondents could rely. It found "no basis for grounding the immunity analysis in evidentiary considerations," and viewed the answer to the immunity question as "not vary[ing] with different evidentiary strategies." *Ibid.* It "le[ft] to the district court the task

of ensuring that defendants do not suffer prejudice from any evidence of their legitimate activities." *Ibid.* The court also noted that, "'just as regulatory context may in [some] cases serve as a basis for implied immunity, it may also be a consideration' in the application of antitrust law," such as by supporting application of the rule of reason rather than a per se prohibition. *Id.* at 58a (quoting *Verizon Commc'ns Inc.* v. *Law Offices of Curtis V. Trinko*, 540 U.S. 398, 412 (2004)).

Accordingly, the court of appeals rejected petitioners' implied immunity defense in its entirety, holding that "we find no [implied] repeal." Pet. App. 70a. The court vacated the district court's dismissal on immunity grounds and remanded for consideration of "alternate grounds to support the district court's dismissal." *Ibid.*

SUMMARY OF ARGUMENT

The federal regulatory regime governing public offerings of securities authorizes a substantial amount of collaborative conduct that might otherwise violate the antitrust laws, and this Court has emphasized the need for a "proper reconciliation of the regulatory and antitrust statutes," *Gordon* v. *NYSE*, 422 U.S. 659, 685 (1975). That reconciliation should give effect to *both* statutory schemes, "rather than holding one completely ousted." *Silver* v. *NYSE*, 373 U.S. 341, 357 (1963).

I. An adequate accommodation of those two critically important statutory schemes recognizes that antitrust immunity must be extended not only to collaborative conduct specifically authorized under the securities regime, but also to activities that are inextricably intertwined with permitted collaboration. As the Court held in *United States* v. *National Ass'n of Securities Dealers, Inc.*, 422 U.S. 694 (1975) (*NASD*), antitrust liability cannot be premised on conduct that is "ancillary" to collaborative activities that the securities laws en-

dorse. *Id.* at 733-734. Moreover, to give full effect to such immunity, the law precludes drawing inferences of illegal activity from conduct that is itself protected. See *Eastern R.R. Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127, 142-143 (1961).

Giving effect to the securities regulatory scheme does not, however, require conferring antitrust immunity for all conduct of underwriters in connection with IPOs. This Court has repeatedly rejected the view that all conduct regulated under another statutory scheme enjoys "a blanket exemption" from antitrust law, *National Gerimed. Hosp. & Gerontology Ctr.* v. *Blue Cross*, 452 U.S. 378, 392 (1981), and has required a more particular showing of "repugnancy between the antitrust laws and the regulatory system," *NASD*, 422 U.S. at 719-720. The broad immunity urged by petitioners would improperly shield anticompetitive conspiracies that are distinct and separable from the permitted activities of an underwriting syndicate.

II. Neither the court of appeals nor the district court adequately accommodated the interests of the two critical statutory frameworks at issue. The court of appeals focused its immunity analysis on the general allegations in respondents' complaint that petitioners engaged in tie-in and laddering activities that are unlawful under the securities regulatory regime. Although the court recognized that many of the complaint's more specific factual allegations recite collaborative conduct that is permitted under the securities laws, the court dismissed that problem as a mere evidentiary issue, distinct from the immunity analysis. Under a proper approach to implied antitrust immunity, the court should have recognized the immunity not only of collaborative activities that are specifically permitted under the securities laws, but also of those activities that are inextricably intertwined with permitted conduct. Moreover, the court should have made

clear that protected conduct—if it is to remain protected—cannot give rise to inferences of illegality. Accordingly, to the extent that the complaint is ambiguous whether the specific conduct on which respondents premise their broad allegations of illegal tie-ins and laddering is itself entitled to immunity, respondents must re-plead to make clear that they do not rely on allegations of protected conduct as a necessary component of their antitrust claim. In categorically rejecting petitioners' immunity defense and thereby precluding further consideration of the defense on remand, the court of appeals failed to give adequate effect to the securities laws.

On the other hand, the district court's dismissal of the complaint with prejudice, based on the SEC's "broad general authority to regulate IPO allocation and underwriter commission practices," Pet. App. 94a, was likewise in error and gives too little weight to the antitrust laws and their fundamental policy of competition. The motion to dismiss should have been considered according to the principles articulated above and, if granted, respondents should have been given an opportunity to re-plead their complaint without reliance on immune conduct. In order for respondents' claims to be allowed to go forward, they must allege facts providing concrete notice and giving rise to a reasonably grounded expectation that the alleged antitrust offense can be established without relying on activities that are authorized under the regulatory scheme or inextricably intertwined with such authorized activities.

ARGUMENT

I. A PROPER ACCOMMODATION OF THE SECURITIES AND ANTITRUST LAWS SAFEGUARDS THE POLICIES OF EACH, RATHER THAN PROMOTING ONE STATUTORY SCHEME TO THE EXCLUSION OF THE OTHER

On numerous occasions, this Court has confronted the "problem of reconciliation of the antitrust laws with a federal

regulatory scheme." *Gordon* v. *NYSE*, 422 U.S. 659, 660 (1975). The need to harmonize the strictures of the federal antitrust laws with federal regulatory policy is particularly acute when the regulatory scheme authorizes competitors to collaborate in ways that might otherwise constitute an antitrust violation. The Court has made clear that the "proper approach" to a claim that a federal regulatory statute impliedly repeals the antitrust laws with regard to challenged conduct "is an analysis which reconciles the operation of both statutory schemes with one another rather than holding one completely ousted." *Silver* v. *NYSE*, 373 U.S. 341, 357 (1963). Indeed, the Court has described the admonition to give effect to both regulatory policies as the "guiding principle" for resolving claims of implied antitrust immunity. *National Gerimed. Hosp. & Gerontology Ctr.* v. *Blue Cross*, 452 U.S. 378, 392 (1981) (*National Gerimed.*). That principle can, and should, be given effect in this case.

A. Antitrust Immunity Extends Not Only To Collaborative Underwriting Activity That Is Expressly Or Implicitly Authorized Under the Securities Laws, But Also To Conduct That Is Inextricably Linked To Such Activity

1. The securities laws permit collaboration by competitors in a number of ways. For example, as the Court has observed, the securities laws evince a "policy of self-regulation" that necessarily "contemplates that the Exchange will engage in restraints of trade which might well be unreasonable absent sanction" by the securities laws. *Silver*, 373 U.S. at 360. See *id.* at 353 (noting that 15 U.S.C. 78f(b) "specifically requires" that a securities exchange "formulate rules governing the conduct of exchange members").

Congress and the SEC have likewise expressly permitted collaboration among underwriters through IPO syndicates —"an essential means" by which underwriters manage and

share risks in underwriting public securities offerings. Pet. App. 5a; 15 U.S.C. 77b(a)(3) (excluding "agreements * * * among underwriters who are or are to be in privity of contract with an issuer" from regulation as offers to buy or sell securities); *Commission Guidance Regarding Prohibited Conduct in Connection with IPO Allocations*, 70 Fed. Reg. 19,674-19,675 (2005) (*Commission Guidance*) (describing "the IPO book-building process"). "A lead underwriter in a syndicate must assess the appropriate issue quantity and pricing for the IPO[,] * * * a difficult task, in which the lead underwriter is aided in part by 'book building.'" Pet. App. 6a (citations omitted). As part of the authorized book-building process, the underwriters discuss price and demand with the issuer and potential investors, and ultimately "agree on the size and pricing of the offering, and * * * how to allocate the IPO shares to purchasers." *Commission Guidance*, 70 Fed. Reg. at 19,675. Such conduct could, absent the framework of securities regulation, raise antitrust concerns.

Congress was well aware of the syndicated underwriting system when it enacted the Securities Act of 1933, 15 U.S.C. 77a *et seq.*, and the Securities Exchange Act of 1934, 15 U.S.C. 78a *et seq.*, and the legislative and regulatory history of those Acts demonstrates that Congress chose regulation rather than prohibition. See generally Pet. App. 4a-6a, 133a-136a. Collaborative activity in the formation and operation of an underwriting syndicate that is permitted by the securities laws must therefore be deemed immune from challenge under the antitrust laws.

2. Antitrust immunity is not, however, limited to conduct that is expressly or implicitly authorized under the securities laws. Contrary to the view seemingly expressed by the court of appeals, a proper reconciliation of the antitrust and securities statutes requires recognition of antitrust immunity for conduct that is directly related to and cannot practicably be

separated from permissible conduct, whether or not that inextricably intertwined conduct itself is authorized under the securities laws. Failure to recognize immunity for activities that are inextricably intertwined with permissible collaborative conduct could effectively vitiate the immunity for the authorized conduct and thus bring the antitrust laws into conflict with the regulatory scheme.

As this Court recognized in *United States* v. *National Ass'n of Securities Dealers, Inc.*, 422 U.S. 694 (1975) (*NASD*), implied antitrust immunity extends to conduct that implements an agreement that is itself approved under a federal regulatory regime, because an antitrust challenge to such conduct could interfere with the regulatory scheme. In *NASD*, the Court considered an antitrust challenge to vertical agreements by which mutual funds sought to restrict the secondary market for their shares, and to a horizontal agreement among members of the NASD to inhibit the growth of a secondary market. *Id.* at 701-702. The Court held that implied antitrust immunity encompassed not only the vertical restraints, which had been authorized by Congress and accepted by the SEC, *id.* at 728, but also the horizontal agreement to encourage such restrictions, *id.* at 733-734, which had not itself been specifically approved by the SEC. The immunity conferred by SEC approval of the vertical restrictions precluded an "attack on the ancillary [horizontal] activities." *Id.* at 734. As the Court explained, "maintenance of an antitrust action for activities so directly related to the SEC's responsibilities poses a substantial danger that appellees would be subjected to duplicative and inconsistent standards." *Id.* at 735. Conduct ancillary to authorized collaborative activity thus acquires "a kind of derivative immunity." *Phonetele, Inc.* v. *AT&T.* 664 F.2d 716, 729 (9th Cir. 1981) (Kennedy, J.), cert. denied, 459 U.S. 1145 (1983).

In other contexts as well, the Court has extended the umbrella of immunity to activity that is inextricably interrelated with core immune conduct. For example, under the *Noerr-Pennington* doctrine, a person or group cannot be held liable under the antitrust laws for petitioning the government to take action that will harm competition. See *United Mine Workers* v. *Pennington*, 381 U.S. 657, 669-670 (1965); *Eastern R.R. Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127, 142-143 (1961) (*Noerr*). Moreover, the Court has held that *Noerr-Pennington* immunity extends to a claim based on "some direct injury" to a competitor that is itself "an incidental effect" of the permissible campaign to influence the government. *Id.* at 143. See *Allied Tube & Conduit Corp.* v. *Indian Head, Inc.*, 486 U.S. 492, 499 (1988) (an anticompetitive restraint "cannot form the basis for antitrust liability if it is 'incidental' to a valid effort to influence governmental action"). Outside the antitrust context, the Court has held that the exacting First Amendment standards applicable to noncommercial speech apply as well to statutory limitations on commercial speech when the "component parts of a single speech are inextricably intertwined." *Riley* v. *National Fed'n of the Blind*, 487 U.S. 781, 796 (1988).

3. The foregoing principles also limit a plaintiff's ability to establish an antitrust violation involving unapproved conduct by means of inferences drawn from evidence of conduct that is expressly or implicitly authorized under a regulatory regime. In an ordinary antitrust case, "antitrust law limits the range of permissible inferences from ambiguous evidence in a § 1 case," *Matsushita Elec. Indus. Co.* v. *Zenith Radio Corp.*, 475 U.S. 574, 588 (1986), but a finder of fact could, under appropriate circumstances, infer the existence of a conspiracy in violation of the antitrust laws from evidence of discussions among the alleged conspirators, combined with sufficiently probative implementing conduct, see, *e.g.*, *United*

States v. *Foley*, 598 F.2d 1323 (4th Cir. 1979), cert. denied, 444 U.S. 1043 (1980). Thus, setting aside the regulatory context, a plaintiff might urge a finder of fact to interpret ambiguous evidence concerning meetings among underwriters and subsequent discussions with potential IPO investors regarding their interest in acquiring additional shares beyond the initial IPO allocation as evidence that the underwriters entered into an agreement to require IPO customers to make future purchases outside the context of the IPO.

But in light of the securities regulatory structure, such an inference would be inappropriate. As an initial matter, of course, the SEC explicitly permits discussions among underwriters in an IPO syndicate, and thus evidence that such discussions occurred vel non would have no probative value in establishing that the underwriters were conspiring to engage in unauthorized conduct. See *Verizon Comme'ns Inc.* v. *Law Offices of Curtis V. Trinko*, 540 U.S. 398, 412 (2004) (*Trinko*) (noting the importance of regulatory context in the application of the antitrust laws). More fundamentally, imposition of antitrust liability (or even allowing the unleashing of costly discovery) on the basis of inferences drawn from permissible book-building activities would inevitably discourage such activities, thereby bringing the antitrust laws into direct conflict with the regulatory scheme. Accordingly, implied immunity must extend to allegations of antitrust violations that rest on inferences to be drawn from collaborative activity by syndicate members that is either permissible in itself or is so closely related to authorized collaboration that it cannot practicably be separated or distinguished from authorized conduct.

As the Court recognized in *Noerr*, an antitrust plaintiff cannot prove an illegal conspiracy to weaken the "competitive position" of a competitor by reliance on "evidence * * * deal[ing] with [the defendants'] efforts to influence the pas-

sage and enforcement of laws." 365 U.S. at 142. To allow liability to be premised upon such evidence would be "tantamount to outlawing" the campaign to change the laws itself. *Id.* at 143-144. In the securities regulatory context, the same principle precludes efforts to state an antitrust claim based on inferences drawn from conduct that is explicitly or implicitly permitted by the securities laws.

B. Implied Immunity Does Not Shield From Antitrust Liability All Conduct Relating To The Sale Of Securities

Implied immunity thus extends to collaborative conduct that is explicitly or implicitly authorized under the securities laws and activity inextricably intertwined with such conduct. It does not follow, however, that petitioners are correct in contending that all conduct connected with initial public offerings is impliedly immune from antitrust liability because the SEC exercises "pervasive" regulatory authority over it. See Pet. 23; Pet. Supp. Br. 2-3. As this Court has instructed, "a cardinal principle of construction [is] that repeals by implication are not favored," *Silver*, 373 U.S. at 357 (quoting *United States* v. *Borden Co.*, 308 U.S. 188, 198 (1939)), and "can be justified only by a convincing showing of clear repugnancy between the antitrust laws and the regulatory system," *NASD*, 422 U.S. at 719-720; *National Gerimed.*, 452 U.S. at 388. "Repeal is to be regarded as implied only if necessary to make the [regulatory statute] work, and even then only to the minimum extent necessary." *Silver*, 373 U.S. at 357.[4] Thus, the Court has repeatedly rejected the view that all conduct regulated under another statutory scheme enjoys "a blanket exemption" from antitrust law. *National Gerimed.*, 452 U.S. at 392. See also *Otter Tail Power Co.* v. *United States*, 410 U.S. 366, 372 (1973) ("Activities which come under the juris-

[4] Indeed, even express statutory exemptions are narrowly construed. See, *e.g.*, *Carnation Co.* v. *Pacific Westbound Conference*, 383 U.S. 213 (1966).

diction of a regulatory agency nevertheless may be subject to scrutiny under the antitrust laws.").[5] Likewise, the conduct of underwriters is not categorically exempt from scrutiny under the antitrust laws merely because it takes place in the context of an IPO.

1. Notably, the Court did not apply a sweeping rule of implied repeal in either *Gordon* or *NASD*, both of which involved conduct regulated by the SEC. In *Gordon*, private plaintiffs sought treble damages for the fixing of commissions pursuant to exchange rules. The Court did not hold that the SEC's regulatory authority was so pervasive that it impliedly repealed all antitrust liability. 422 U.S. at 688-689. Rather, the Court focused on the fact that Congress had specifically granted the SEC "the power to fix and insure 'reasonable' rates" of commission, *id.* at 666, and the SEC, which had "thoroughly exercised its supervisory powers" over the system of fixed commissions, *id.* at 668, had effectively authorized the use of fixed rates during the time period at issue in the complaint, *id.* at 667-675, 689-690. As the Court explained, the SEC's approval of fixed rates was "not significantly different" from "an affirmative order to the exchanges to follow fixed rates." *Id.* at 689 n.13. Fixed commissions were not prohibited by the SEC until 1975, several years *after* the suit was filed. *Id.* at 660, 675.

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[5] In *Otter Tail*, there was no implied immunity because "nothing in the legislative history [of the Federal Power Act] * * * reveal[ed] a [congressional] purpose to insulate electric power companies from the operation of the antitrust laws." 410 U.S. at 373-374. Similarly, in *United States* v. *Philadelphia National Bank*, 374 U.S. 321 (1963), the Court held that the Bank Merger Act of 1960, which required the Comptroller of the Currency to review and approve certain bank mergers under a public interest standard, did not provide antitrust immunity for approved mergers because there was no evidence that Congress intended to oust antitrust enforcement. *Id.* at 352.

Similarly, in *NASD* the Court reviewed the legislative history of the securities statute and found that the challenged vertical restrictions on mutual fund sales and distributions were "among the kinds of restrictions Congress contemplated when it" granted the SEC authority to approve such rules. 422 U.S. at 721. The SEC exercised a significant oversight function, and its decision not to prohibit the contested restraints reflected the Commission's approval of those restrictions as well as of the challenged NASD rules and interpretations. *Id.* at 728, 733. That authorization, contemplated by Congress, could not be reconciled with application of the antitrust laws, under which the restrictions would have been illegal per se. *Id.* at 729, 733. Although the joint efforts of NASD members to encourage the kinds of restraints at issue were not themselves specifically required or approved, that conduct also was immune because it was "designed to encourage * * * precisely the restriction that the SEC consistently ha[d] approved pursuant to [statute] for nearly 35 years." *Id.* at 733. Certainly, nothing in *Gordon* or *NASD* supports petitioners' view that anticompetitive conduct that is and always has been *forbidden* under the securities laws is nonetheless categorically immune from liability under the antitrust laws.

2. In other areas of the law in which immunity extends to conduct that is "inextricably intertwined" with protected conduct, see p. 14, *supra*, the Court has recognized that the immunity doctrine does not sweep within its scope all conduct that bears any connection to the core protected conduct. The *Noerr-Pennington* doctrine, for example, does not permit competitors "to enter into horizontal price agreements as long as they wish[] to propose that price as an appropriate level for governmental ratemaking or price supports." *Allied Tube & Conduit*, 486 U.S. at 503. Similarly, in *FTC* v. *Superior Court Trial Lawyers Ass'n*, 493 U.S. 411 (1990), the Court held that a boycott by court-appointed attorneys was

not protected by the *Noerr-Pennington* doctrine, despite the boycott organizers' purpose to force the government to enact legislation increasing their compensation rates, but the doctrine did protect the defendants' separable efforts "to publicize the boycott, to explain the merits of its cause, and to lobby District officials to enact favorable legislation." *Id.* at 424-426. The Seventh Circuit has held that competitors who allegedly agreed to fix prices were not entitled to immunity under *Noerr* merely because they also had legitimate discussions about an industry position on price control legislation at the same meeting. See *In re Brand Name Prescription Drugs Antitrust Litig.*, 186 F.3d 781, 788-789 (7th Cir. 1999), cert. denied, 528 U.S. 1181 (2000).[6] Those cases recognize that the immunity for protected activity cannot be extended to the point of creating an antitrust-law-free zone, in which the legitimate basis for collaborative activity can be used as a shield to protect unrelated conspiracies.

By parity of reasoning, implied antitrust immunity does not extend to conduct that occurs in conjunction with permissible underwriting activities but can practicably be considered separately without chilling authorized underwriting activity. As in the *Noerr-Pennington* context, an illegal agree-

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[6] See also *Webb* v. *Utah Tour Brokers Ass'n*, 568 F.2d 670, 672-676 (10th Cir. 1977) (filing protests with government agencies in opposition to a potential competitor's application for certification was protected by *Noerr*; a conspiracy to boycott the potential competitor, discussed at the same meetings, was not); *Alexander* v. *National Farmers Org.*, 687 F.2d 1173, 1200-1203 (8th Cir. 1982) (litigation against a competitor arising from a genuine dispute was protected by *Noerr*; using that dispute "as a pretext for threatening litigation against and otherwise harassing" the competitor's customers was not), cert. denied, 489 U.S. 1081 (1989).

In the commercial/non-commercial speech context likewise, the Court has applied the less stringent standard for commercial speech in a setting where the commercial and non-commercial aspects of a presentation were easily distinguished. *Board of Trs. of State Univ.* v. *Fox*, 492 U.S. 469, 473-475 (1989).

ment to restrain competition is not shielded merely because it was entered into at the same place and time as a meeting of competitors that is authorized by the securities laws. Thus, while immunity is justified by the need to protect authorized underwriting syndicate activity in connection with an IPO, that immunity will not extend to conduct beyond the scope of the IPO, if an alleged antitrust violation is proved without reliance on permitted IPO syndication activities. For example, underwriters in an IPO syndicate would not be entitled to implied antitrust immunity to the extent they used a road show meeting as an occasion to allocate exclusive territories for the placement of new branch brokerage offices. The question in each case is whether, as a practical matter, the alleged antitrust violation is separable from conduct authorized under the securities laws, such that activity protected under the securities laws or inextricably intertwined with such activity (or inferences drawn from such activity) will not serve as the basis for imposition of antitrust liability.

Distinguishing between permissible and impermissible conduct in the IPO context can present close and difficult questions in some circumstances. See, *e.g.*, *Commission Guidance*, 70 Fed. Reg. at 19,676. But the difficulties have not proven insuperable in the *Noerr-Pennington* context, and they should not preclude application of the distinction in this context. Contrary to petitioners' apparent suggestion (see Pet. Supp. Br. 2-4), it does not follow that every alleged agreement among IPO participants to inflate prices through tie-ins or laddering is necessarily immune from antitrust scrutiny on the ground that it is inextricably intertwined with approved conduct. As previously discussed, see pp. 11-14, *supra*, such an antitrust claim would be clearly barred to the extent plaintiffs challenge conduct that should be deemed immune because—while it might ultimately be found impermissible under the regulatory scheme—it is so closely related

to approved collaboration in the course of underwriting an IPO that it cannot, as a practical matter, be readily distinguished and separately proved without impermissibly chilling permitted conduct. Likewise, plaintiffs may not plead or prove an illegal conspiracy on the basis of inferences drawn from attendance at road shows, participation in discussions of topics within the scope of legitimate book-building, or similar permitted conduct.

There is no basis, however, for holding as a categorical matter that an antitrust violation can *never* be proven in the IPO context because any such claim would necessarily rely on, or call into question, approved collaboration among members of the underwriting syndicate. If, for example, underwriters entered an express horizontal agreement to restrict competition through practices not authorized under the securities regulatory scheme and outside the scope of the collaboration in underwriting and promoting a particular IPO, neither the securities laws nor the antitrust laws—both of which condemn aspects of the conduct—should immunize the misconduct. While courts should demand specific allegations of forbidden misconduct and disallow inferences from authorized conduct, automatic dismissal of all antitrust claims involving conduct related to the IPO process is not necessary in order to preclude only those suits founded upon conduct that constitutes, or is inextricably intertwined with, permissible underwriting activity.

3. Petitioners' ultimate argument (Pet. 27-28) is that the Court should, as an exercise of judicial policymaking, confer broad antitrust immunity for conduct relating to the securities markets because, in petitioners' view, the prospect of treble damages awards by federal juries applying the antitrust laws will unduly disrupt the capital formation process. While those concerns are legitimate and counsel in favor of both extending immunity beyond the scope acknowledged by

the court of appeals and carefully scrutinizing complaints, see pp. 11-16 , *supra*, to the extent that petitioners seek a blanket immunity, such arguments are properly directed to Congress, not the courts. Congress has enacted various express antitrust exemptions, and has placed restrictions on certain types of actions under the securities laws,[7] but as yet it has not chosen to confer the blanket immunity from antitrust liability that petitioners urge.

Congress, moreover, has the flexibility to tailor express immunity to serve the ends of both the securities and antitrust laws. If it so chose, for example, Congress could confer immunity from treble damages suits while allowing the Department of Justice to continue to bring enforcement actions. By contrast, the sweeping antitrust immunity endorsed by the district court and urged on this Court by petitioners would oust not only private treble damages actions but also government antitrust enforcement from the securities industry. Contrary to petitioners' suggestion (Pet. 30), application of the securities laws does not render the antitrust laws superfluous to the IPO process. The two statutory schemes serve complementary but distinct purposes, and conduct that is prohibited by one may or may not violate the other. For example, the securities laws prohibit an underwriter's unilateral manipulation of the market through mandated laddering arrangements, whereas such conduct by a single underwriter would not necessarily give rise to antitrust liability. But the antitrust laws do address, in a way that the securities laws do not, the distinct evil of a conspiracy across underwriters and across IPOs to require such arrangements of all purchasers. There is no evidence that Congress intended, as petitioners

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[7] See Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, 109 Stat. 737; Securities Litigation Uniform Standards Act of 1998, Pub. L. No. 105-353, 112 Stat. 3227.

suggest, to leave vindication of the antitrust laws' policy of competition to enforcement of the securities laws alone.[8]

II. RESPONDENTS' CLAIMS ARE BARRED TO THE EXTENT THEY REST ON INFERENCES ARISING FROM ALLEGATIONS REGARDING PERMISSIBLE COLLABORATIVE ACTIVITY OR CONDUCT INEXTRICABLY INTERTWINED WITH SUCH ACTIVITY

A. The decision of the court of appeals fails to provide adequate protection for the securities laws' policy of encouraging certain types of collaborative activity. As the government's amicus filings in the lower courts emphasized, many of the more specific factual allegations in the complaint describe collaboration among underwriters that the SEC permits, and in some instances encourages, as part of the capital formation process. Underwriters of an IPO are authorized, in furtherance of that IPO, to combine into underwriting syndicates; to agree that the lead underwriter will distribute all the shares and that all syndicate members will share in the underwriters' discount; to hold meetings of investment bankers, legal officers, and market makers; and to disclose information about each underwriter's IPO customers. See Pet. App. 154a-155a, 177a, 206a-207a (referring, in particular, to

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[8] The Department of Justice cooperates with the SEC to identify and address potential violations of the antitrust laws, as well as related competitive concerns under the securities laws. The Department has brought antitrust enforcement actions against, for example, anticompetitive agreements related to conventions for quoting stock prices, see *Stipulation and Order and Competitive Impact Statement*, United States *v.* Alex. Brown & Sons, Inc., 61 Fed. Reg. 40,439 (1996), and hedge fund trading of U.S. Treasury notes, see *Proposed Final Judgment and Competitive Impact Statement*, United States *v.* Steinhardt Mgmt. Co., 60 Fed. Reg. 3263-3264 (1995). The Department also investigates joint ventures and acquisitions in the securities industry. The Department's enforcement of antitrust laws in the securities context has saved consumers billions of dollars.

specific conduct alleged in Am. Compl. ¶¶ 38, 39, 45-48, 56, 62). Underwriters are also authorized to collaborate as members of trade associations and exchanges in accordance with SEC-approved rules. See Pet. App. 154a (referring to Am. Compl. ¶ 47). All such conduct is immune from antitrust scrutiny, as is any related conduct that cannot practicably be separated from it.

The court of appeals recognized that "the complaint details a host of conduct recognized as legitimate by the SEC," and that it would be necessary to "ensur[e] that defendants do not suffer prejudice from any evidence of their legitimate activities." Pet. App. 61a n.47. But the court failed to appreciate fully the relationship between the complaint's reliance on permissible conduct and its vague and conclusory allegations of a conspiracy to raise prices through prohibited laddering and tie-ins, which appear to rest in part or in whole on inferences from potentially permissible conduct. The court thus erred in conclusively resolving the implied antitrust immunity issue in respondents' favor merely because the complaint includes conclusory allegations of conduct that is forbidden by the securities laws. See *id.* at 70a ("find[ing] no repeal" of the antitrust laws and remanding only for consideration of "alternate grounds" for dismissal).

The issue with respect to implied immunity is not whether a regulatory violation has been alleged. See *Trinko*, 540 U.S. at 406 (creation of duties under regulatory scheme "does not automatically lead to the conclusion that they can be enforced by means of an antitrust claim"). Rather, the question is whether the complaint adequately alleges an antitrust offense, without reliance on conduct that is authorized under the regulatory scheme or that is inseparable from such conduct. A complaint must allege facts that provide the defendant with concrete notice of the claims against it, *Conley* v. *Gibson*, 355 U.S. 41, 47 (1957), and give rise to a reasonably

grounded belief that the plaintiff may ultimately be able to prove its claim, see *Dura Pharms., Inc.* v. *Broudo*, 544 U.S. 336, 347 (2005). In the context of this suit, therefore, the complaint's allegations must give rise to a reasonably grounded inference of an antitrust violation without relying on conduct that was authorized under the regulatory scheme or inextricably intertwined with such immune conduct.

The government does not, as respondents contend (Resp. Supp. Br. 3), urge the Court to adopt "a novel pleading standard." Rather, the government relies on the accepted principle that the adequacy of a complaint to demonstrate a reasonable basis for inferring wrongful conduct must be measured against the substantive legal standards applicable to that claim. See *Dura Pharms.*, 544 U.S. at 341-342; see also James Wm. Moore et al., *Moore's Federal Practice* § 8.04[1][a] at 8-24.1 (3d ed. 2006) ("Whether a statement of claim is sufficient to give fair notice depends in part on the complexity of the case."). As this Court has observed, it is essential that a district court "retain the power to insist upon some specificity in pleading before allowing a potentially massive factual controversy to proceed." *Associated Gen. Contractors of Cal., Inc.* v. *California State Council of Carpenters*, 459 U.S. 519, 528 n.17 (1983).

In short, "the appropriate level of generality for a pleading depends on the particular issue in question or the substantive context of the case before the court." 5 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1218, at 273 (3d ed. 2004) (Wright & Miller). In the context of this case, the substantive standard is set by the imperative need to avoid conflict with the securities regulatory regime. Accordingly, the complaint must make clear that the claims alleged do not rest on impermissible inferences from protected conduct. A court should not permit discovery to go forward as a fishing expedition based on conclusory or ambig-

uous allegations that focus on immune conduct. See generally U.S. Br. in *Bell Atlantic Corp.* v. *Twombly*, No. 05-1126.

B. In view of the complaint's extensive reliance on allegations of immune conduct, the court of appeals erred in categorically rejecting petitioners' immunity defense without considering whether respondents' allegations of prohibited conduct can, as a practical matter, be separated from conduct that is permitted by the regulatory scheme. In this case, it is particularly difficult to discern whether respondents have adequately pleaded non-immune anticompetitive conduct sufficient to defeat the motion to dismiss on implied immunity grounds. The allegations of forbidden tie-in and laddering agreements are largely confined to conclusory assertions in the background section of the complaint, whereas the more specific factual allegations concerning the alleged unlawful conspiracy detail conduct that is (or might be) immune.

For example, in their "Summary of Allegations," Am. Compl. 1, respondents allege that petitioners "agree[d] to require that, in order to obtain IPO shares of a Class Security, customers had to place bids for and/or purchase quantities of such Class Security in the aftermarket at prices above the IPO price in order to systematically and significantly inflate the after-market prices of IPOs—a practice known as 'laddering.'" *Id.* ¶ 7. However, in the section of the complaint headed "The Making and Implementation of Defendants' Unlawful Agreement," *id.* at 19, which lays out the acts petitioners are alleged to have taken in connection with the unlawful agreements, the more specific allegation regarding "laddering" is that during "road shows" and other communications with customers before the IPOs, petitioners "at times jointly, made inquiries of customers or others interested in purchasing Class Securities concerning the number of shares that such person would be willing to purchase in the aftermarket and the prices such person would be willing to pay for

such shares." *Id.* ¶ 54. That allegation is sufficiently vague that it encompasses permissible book-building conduct between underwriters and investors that the SEC has specifically approved as important in determining the size and price of the offering as well as the allocation of shares, based on understanding long-term investor interest in and valuation of the company. The *Commission Guidance* specifically permits inquiries "as to customers' desired future position in the longer term (for example, three to six months) and the price or prices at which the customer might accumulate that position," while clarifying that "inquir[ing] whether the customer intends to place orders in the immediate aftermarket, and if so, at what prices and quantities" is prohibited under the securities laws as an impermissible tie-in. 70 Fed. Reg. at 19,676.

The structure of respondents' complaint, which asserts the existence of a prohibited conspiracy in conclusory fashion in the "Summary" and supports that claim with more particular allegations of conduct that is (or may be) immune from antitrust challenge, strongly suggests that respondents' allegation of an illegal conspiracy is no more than an inference that respondents have drawn from protected collaboration among petitioners—an inference that is forbidden by principles of implied antitrust immunity. To the extent the complaint is ambiguous whether the specific conduct on which respondents premise their broad allegations of illegal tie-ins and laddering is itself entitled to immunity, respondents should be required to re-plead to make clear that they are not relying on protected activities as a necessary component of their claim. See Fed. R. Civ. P. 12; *Crawford-El* v. *Britton*, 523 U.S. 574, 598 (1998) (district "court may insist that the plaintiff 'put forward specific nonconclusory allegations' that establish" a violation "in order to survive a prediscovery motion for dismissal or summary judgment," and Rule 12(e) is one of the "primary options prior to permitting any discovery

at all" to do so) (citation omitted). By categorically rejecting petitioners' immunity defense and thereby foreclosing the district court on remand from dismissing on immunity grounds with leave to re-plead, the court of appeals failed to give adequate effect to the securities laws.

At the same time, the district court's dismissal of the complaint with prejudice, based on the SEC's "broad general authority to regulate IPO allocation and underwriter commission practices," Pet. App. 94a, is inconsistent with this Court's repeated rejection of "a blanket exemption" from antitrust law for all conduct regulated under another statutory scheme, *National Gerimed.*, 452 U.S. at 392. Thus, the court of appeals was correct to vacate the district court's dismissal of the complaint with prejudice. See 5B Wright & Miller, § 1357, at 739 ("[L]eave to amend should be refused only if it appears to a certainty that the plaintiff cannot state a claim."); cf. *United States* v. *Georgia*, 126 S. Ct. 877, 882 (2006) (once a vague complaint is amended on remand, the lower courts can determine which aspects of the alleged conduct would violate the Constitution or the relevant statute and the extent to which that conduct is protected by sovereign immunity). Respondents should be given an opportunity on remand to amend their complaint unless it appears to a certainty that they cannot allege, in good faith and in compliance with Federal Rule of Civil Procedure 11(b), facts sufficient to state an antitrust claim that does not rely on authorized conduct.

C. Even if the district court on remand were ultimately to deny a motion to dismiss on antitrust immunity grounds, its obligation to avoid conflict between the antitrust laws and the regulatory scheme would not cease. As the court of appeals observed, Pet. App. 61a n. 47, the district court has a continuing obligation to ensure that petitioners are not prejudiced by virtue of their legitimate conduct. Accordingly, the court must exercise its power to manage this complex action,

see Fed. R. Civ. P. 16, and use its "broad discretion to tailor discovery narrowly and to dictate the sequence of discovery," *Crawford-El*, 523 U.S. at 598; see Fed. R. Civ. P. 26.

The district court must also strictly limit any use of evidence of protected activity, see Fed. R. Evid. 105,[9] and exclude that evidence when (as will often be true) it is irrelevant or unduly prejudicial, see Fed. R. Evid. 402, 403; cf., *e.g.*, *United States Football League* v. *NFL*, 842 F.2d 1335, 1374-1375 (2d Cir. 1988) (evidence of conduct protected by *Noerr-Pennington* doctrine properly excluded from antitrust case because more prejudicial than probative); *Feminist Women's Health Ctr.* v. *Mohammad*, 586 F.2d 530, 543 n.7 (5th Cir. 1978) (same), cert. denied, 444 U.S. 924 (1979). "[C]are must be taken not to allow proof of a vague 'overall scheme' on the basis of the protected activities alone." 1 Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 212, at 285 (2d ed. 2000). And if at any point the district court determines that respondents cannot establish an antitrust violation without relying on conduct that is authorized by the regulatory scheme or cannot be practicably separated from authorized conduct, the court must grant judgment for petitioners. See Fed. R. Civ. P. 12(b)(6), 12(c), 50, 56(a).

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[9] For example, evidence that at various times and places the defendants held meetings, during which they allegedly engaged in both authorized collaboration and unauthorized and separable collusion, might be relevant for the limited purpose of providing the necessary context to the antitrust conspiracy. Cf. *United Mine Workers* v. *Pennington*, 381 U.S. 657, 670-71 n.3 (1965) (evidence of protected activity may be admissible to show the purpose and character of other conduct, but only if "probative and not unduly prejudicial"). As we have noted, however, see pp. 14-16, *supra*, an antitrust plaintiff should not be permitted to establish an antitrust violation on the basis of inferences drawn from conduct that is immune from antitrust scrutiny because it is approved under the regulatory scheme.

CONCLUSION

The judgment of the court of appeals should be vacated and the case remanded for further proceedings.

Respectfully submitted.

PAUL D. CLEMENT
Solicitor General

THOMAS O. BARNETT
Assistant Attorney General

THOMAS G. HUNGAR
Deputy Solicitor General

DAVID L. MEYER
Deputy Assistant Attorney General

RICHARD M. HUMES
Associate General Counsel
Securities and Exchange Commission

DOUGLAS HALLWARD-DRIEMEIER
Assistant to the Solicitor General

CATHERINE G. O'SULLIVAN
NANCY C. GARRISON
JAMES J. FREDRICKS
Attorneys

WILLIAM BLUMENTHAL
General Counsel
Federal Trade Commission

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No. 05-1157

In The
Supreme Court of the United States

CREDIT SUISSE SECURITIES (USA) LLC,
fka CREDIT SUISSE FIRST BOSTON LLC, ET AL.,

Petitioners,

v.

GLEN BILLING, ET AL.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF FOR AMERICAN ANTITRUST INSTITUTE AS *AMICUS CURIAE* SUPPORTING RESPONDENTS

JOSEPH GOLDBERG
Counsel of Record
MATTHEW L. GARCIA
FREEDMAN BOYD DANIELS
HOLLANDER GOLDBERG & IVES, P.A.
20 First Plaza, Suite 700
Albuquerque, NM 87102
(505) 842-9960

DANIEL E. GUSTAFSON
GUSTAFSON GLUEK PLLC
650 Northstar East
608 Second Avenue South
Minneapolis, MN 55402
(612) 333-8844

DARREN BUSH, PH.D.
Assistant Professor of Law
UNIVERSITY OF HOUSTON LAW CENTER
100 Law Center
Houston, TX 77204
(713) 743-3346

Counsel for Amicus Curiae

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

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INTEREST OF *AMICUS CURIAE*[1]

The American Antitrust Institute ("AAI") is an independent non-profit education, research, and advocacy organization. Its mission is to advance the role of competition in the economy, protect consumers, and sustain the vitality of the antitrust laws. The Advisory Board of AAI, which serves in a consultative capacity,[2] consists of prominent antitrust lawyers, law professors, economists, and business leaders. *See* http://www.antitrustinstitute.org.

AAI's Board of Directors has authorized the filing of this brief because it believes that the Second Circuit Court of Appeals correctly determined that the petitioners' allegedly anticompetitive activities are not protected from the broad reach of the antitrust laws by the doctrine of implied immunity. Should this Court determine otherwise, the doctrine of implied immunity will be unnecessarily expanded thereby undermining the intended effects of the antitrust laws. Thus, in an effort to protect competition as a fundamental policy of this nation, the AAI submits this brief in support of the respondents.

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[1] The written consents of all parties to the filing of this brief have been lodged with the Clerk. No counsel for a party has authored this brief in whole or in part, and no person or entity other than AAI or its counsel has made a monetary contribution to the preparation or submission of this brief.

[2] The AAI is managed by its Board of Directors. The individual views of members of the Advisory Board may differ from the positions taken by AAI.

SUMMARY OF ARGUMENT

Any determination of implied immunity requires recognition of the primacy of Congress's policy favoring competition which underlies this nation's antitrust laws. The arguments of petitioners and several amici focus primarily on the policies underlying the securities laws in question. Such focus is misplaced and understates the role of the antitrust laws as a fundamental national policy. The existence of regulation does not necessarily imply a disregard for competition. Indeed, Congress and this Court have seen no reason to displace the role of the antitrust laws due to the mere existence of a regulatory agenda. It is unnecessary to confer broad immunity in order to have properly functioning regulation.

Against this backdrop, the Second Circuit Court of Appeals was correct in holding that the claims arising from the tying and laddering conduct were not immunized from the broad reach of the antitrust laws. The court of appeals, relying on this Court's precedent, properly determined that the regulatory scheme of the Securities and Exchange Commission was not so pervasive as to indicate a Congressional intent to abandon competition, nor did the court of appeals find the type of conflict (or potential conflict) between a regulatory action and the antitrust laws such that application of the antitrust laws would frustrate the regulation, thereby supporting an inference that Congress must have intended to displace the antitrust laws in these regards.

Extending any implied immunity to conduct supposedly "inextricably linked" to authorized conduct would create a wholly new category of implied immunity, inconsistent with the decisions of this Court and the appropriate

recognition of the primacy of the policies favoring competition that underlie the antitrust laws. Nor does this Court's holding in *Verizon Communications v. Law Offices of Curtis V. Trinko, LLP. (Trinko)*, 540 U.S. 398 (2004) require the application of immunity to the present facts. *Trinko* does not address implied immunities and its reasoning is inconsistent with settled implied immunities analysis.

There is no justification for a heightened pleading standard, and there is certainly no justification for a heightened standard to plead around an affirmative defense, which is what petitioners and amici argue in favor of here. Their request conflicts with the undeviating line of cases culminating in this Court's decision in *Jones v. Bock*, ___ U.S. ___, 127 S.Ct. 910, 919-20 (2007).

This Court should reject a categorical rule prohibiting the introduction of evidence of authorized conduct from which the jury could infer unauthorized behavior, not immunized under the antitrust laws. There is no reason in this case to depart from longstanding and well-established precedent to create a categorical rule for implied immunity cases. Any categorical prohibition would be contrary to this Court's longstanding jurisprudence that conduct that might otherwise be subject to immunity can still constitute part of the evidence admitted, within the discretion of the trial court, on a motion or at trial. *See United Mine Workers v. Pennington*, 381 U.S. 657 (1965).

ARGUMENT

I. ANY DETERMINATION OF IMPLIED IMMUNITY MUST BE MADE AGAINST THE SETTLED RECOGNITION OF THE PRIMACY OF COMPETITION REFLECTED BY THE SHERMAN ACT AND JUDICIAL RELUCTANCE TO FOSTER PROTECTIONISM THROUGH PROLIFERATION OF IMPLIED IMMUNITIES.

Petitioners and several amici would have this Court determine the existence and scope of any implied immunity in this case by focusing primarily on the policies underlying the securities laws in question and the resulting regulation of securities markets. Pet. Br. at 23-38; *See also* NYSE Br. at 13-17. But that focus turns the settled jurisprudence on its head and diminishes the importance of the policies favoring competition that underlie the Sherman Act. The antitrust laws constitute a "fundamental national economic policy." *Carnation Co. v. Pacific Westbound Conference*, 383 U.S. 213, 218 (1966). "Antitrust laws in general, and the Sherman Act in particular, are the Magna Carta of free enterprise. They are as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms." *United States v. Topco Associates, Inc.*, 405 U.S. 596, 610 (1972). It is for this reason that courts have long recognized that it is improper for courts to "set sail on a sea of doubt" and to arrogate to themselves the power to declare "how much restraint of competition is in the public interest, and how much is not" through judicially-crafted limitations on the application of the antitrust statutes. *United States v. Addyston Pipe & Steel Co.*, 85 F. 271, 284 (6th Cir. 1898),

modified & aff'd, 175 U.S. 211 (1899).[3] This cautious view of immunity claims is consistent with the proper role of the courts in enforcing the nation's fundamental belief in the benefits of competition. *See* 1A PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW § 243, at 40 (2d ed. 2000) (stating that the court's proper role in determining the existence and scope of any implied immunity is to take "a skeptical, activist view that sees the antitrust court as a watchful overseer not only of private conduct, but also of the agencies themselves").

Moreover, the primary focus on regulation as the starting point of analysis, as urged by petitioners and certain amici, rests on a false dichotomy between antitrust/competition, on the one hand, and regulation/monopoly on the other. As this country's economy moves increasingly to the "deregulated," there is a reduced level of tension between regulation and competition. *See* Peter C. Carstensen, *Evaluating "Deregulation" of Commercial Air Travel: False Dichotomization, Untenable Theories, and Unimplemented Premises*, 46 WASH. & LEE L. REV. 109, 116 (1989) (noting dichotomy of regulation/

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[3] Although the antitrust laws are expressed as a statute and not a Constitutional provision, Congress "exercise[d] all the power it possessed" under the Commerce Clause when it approved the Sherman Act. *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 111 (1980) (quoting *Atlantic Cleaners & Dyers v. United States*, 286 U.S. 427, 435 (1932)). Accordingly, claims of implied immunity are viewed with a healthy dose of skepticism by the courts. *United States v. National Ass'n of Securities Dealers, Inc. (NASD)*, 422 U.S. 694, 719 (1975) (holding that implied antitrust immunity "can be justified only by a convincing showing of clear repugnancy between the antitrust laws and the regulatory system"); *see also United States v. AT&T Co.*, 461 F. Supp. 1314, 1321 (D.D.C. 1978) (holding that regulated conduct is immune by implication from antitrust laws only in narrow instances).

deregulation "is false with respect to analysis of regulation and deregulation of any industry, and is extremely so with respect to commercial air travel"). Even in deregulated industries, antitrust and regulation serve complementary but not identical purposes. *See* Darren Bush & Carrie Mayne, *In (Reluctant) Defense of Enron: Why Bad Regulation Is to Blame for California's Power Woes (or Why Antitrust Law Fails to Protect against Market Power When the Market Rates Encourage Its Use)*, 83 OR. L. REV. 207 (2004). What this means is that the existence of regulation does not necessarily imply a disregard for competition.

Confining the scope of immunity to limited and narrow circumstances protects the policy choice Congress has made in establishing and repeatedly reaffirming its commitment to the antitrust laws as a critically important component of the national economy. Congress and this Court have seen no reason to displace the role of the antitrust laws due to the mere existence of a regulatory agenda. *See National Gerimedical Hosp. and Gerontology Ctr. v. Blue Cross of Kansas City*, 452 U.S. 378, 389 (1981) (The existence of a regulatory scheme by itself does not evidence an intent to repeal the antitrust laws "with respect to every action taken within the industry."). As this Court has recognized, it is unnecessary to confer broad immunity in order to have properly functioning regulation.

II. THE SECOND CIRCUIT CORRECTLY APPLIED THIS COURT'S JURISPRUDENCE ON IMPLIED IMMUNITIES IN HOLDING THAT THE TYING OR LADDERING CLAIMS WERE NOT IMPLIEDLY IMMUNIZED, AND THIS COURT SHOULD REJECT THE INVITATION TO EXTEND ANY IMPLIED IMMUNITY TO CONDUCT "INEXTRICABLY LINKED" TO OTHER IMPLIEDLY IMMUNIZED CONDUCT.

The Second Circuit below correctly decided that although some of the conduct (such as the collaborative underwriting of the IPOs or stabilization activities) identified in respondents' complaints was immunized from antitrust liability because of the regulation of the securities markets in question, the alleged tying and laddering conduct was not immunized. As the Brief for the United States as Amicus Curiae shows, this holding represents "a proper accommodation" of the policies underlying both sets of laws. United States Amicus Br. at 10-11. We agree with the Solicitor General that extending an implied immunity to the tying or laddering claims would unduly disregard the policies of competition underlying the antitrust laws where such disregard is not required by the regulation of the securities markets.

The touchstone of any judicial finding of implied immunity must be a determination that Congress must have intended such an immunity. *National Gerimedical Hosp. and Gerontology Ctr.*, 452 U.S. at 389. The settled holdings of this Court, repeatedly applied by lower courts throughout the country, find such an implied intent to immunize only in two narrowly defined situations: (1) a regulatory scheme so pervasive as "to indicate that Congress must be assumed to have forsworn the paradigm of competition," *Billing v. Credit Suisse First Boston, Ltd.*,

426 F.3d 130, 161 (2d Cir. 2005) (citing *NASD*, 422 U.S. at 730), or (2) where there is a specific conflict (or potential conflict) between a regulatory action and the antitrust laws so that application of the antitrust laws would frustrate the regulation, thereby supporting an inference that Congress must have intended to displace the antitrust laws in these regards.[4] *Gordon v. New York Stock Exchange*, 422 U.S. 659, 691 (1975) (the regulatory scheme must render the antitrust laws nugatory for immunity to apply). Consistent with repeated holdings from this Court, the Second Circuit below found that regulation of the IPO securities market was not sufficiently pervasive to warrant an implied immunity. *Billing*, 426 F.3d at 170-171. With regard to the second circumstance warranting implied immunity, the court below faithfully applied this Court's reasoning in *Gordon*. Noting that both tying and laddering are disapproved by the regulators, the Second Circuit correctly determined that there is nothing in the imposition of antitrust liability for this conduct that creates a conflicting mandate on the defendants or frustrates regulation of the IPO market. *Id.* at 169.

While the Solicitor General agrees that any implied immunity (for the collaborative underwriting of the IPOs,

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[4] For example, the regulation could be undermined by (i) subjecting the regulated persons or firms to conflicting requirements – one requirement under the regulation and a conflicting requirement under the antitrust laws; or (ii) making it impossible for the clear regulatory intent to be accomplished. *Gordon*, 422 U.S. at 689 (finding immunity where the exchanges "might find themselves unable to proceed without violation of the mandate of the courts or the SEC"); *see also*, *NASD*, 422 U.S. at 727 (finding immunity, in part, because precluding fixed commission rates "would render nugatory the legislative provision for regulatory agency supervision of exchange commission rates").

for example) does not extend to the tying and laddering conduct, the Solicitor General seeks to extend the implied immunity for the "authorized" conduct to that conduct which is "inextricably linked" to immunized collaborative underwriting conduct. United States Amicus Br. at 11-16. We disagree. Extending any implied immunity to conduct supposedly "inextricably linked" to authorized conduct creates a wholly new category of implied immunity, inconsistent with the decisions of this Court and the appropriate recognition of the primacy of the policies favoring competition that underlie the antitrust laws.

The Solicitor General's attempt to create a third category of implied immunity should be rejected for three reasons. *First*, this new category goes beyond the proper limitation for any implied immunity that this Court has recognized. Thus, in *Silver v. New York Stock Exchange*, 373 U.S. 341, 357 (1963), this Court stated the proper limitation: "Repeal is to be regarded as implied only *if necessary* to make the [subsequent law] work, and even then only to the minimum extent necessary. This is the guiding principle to reconciliation of the two statutory schemes." (Emphasis added). Thus, the question with respect to the scope of immunity is not whether the conduct is "intertwined" with permitted conduct but rather whether such immunity is "necessary" to make the regulatory regime work.

Second, the Solicitor General's proposed standard would reverse the presumption from one *against* a finding of implied immunity to one in favor of such a finding. In defining the new category, the Solicitor General describes the inquiry of the trial court: "[I]f at any point the district court determines that respondents cannot establish an antitrust violation without relying on conduct

that is authorized by the regulatory scheme or cannot be practicably separated from authorized conduct, the court must grant judgment for petitioners." United States Amicus Br. at 29. Thus, under the Solicitor General's suggestion, the courts would create immunity without any finding that such immunity was necessary or that Congress impliedly intended such immunity.[5]

Third, the Solicitor General's analysis relies heavily on the Noerr-Pennington line of cases to support the proposition of extending implied immunity to "inextricably linked" conduct. But the Noerr-Pennington cases and their analyses reflect heightened First Amendment concerns not present here. This Court has recognized that Congress has "traditionally exercised extreme caution in legislating with respect to problems relating to the conduct of political activities, a caution which has been reflected in the decisions of this Court interpreting such legislation." *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 141 (1961) (noting that expansive application of antitrust laws in the political realm would run against such judicial and Congressional caution). Those heightened First Amendment concerns make inapplicable the primacy of the competition policy which is at the heart of the implied immunity analysis. But, outside of the First Amendment context, the primacy of the competition policy prevails, warranting the traditional reluctance against expansion of implied immunity. The Solicitor General's reliance on the Noerr-Pennington doctrine is misplaced.

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[5] Thus, the Solicitor General would seek to expand immunity to activity not immune, creating immunity by proximity.

III. *TRINKO* DOES NOT REQUIRE EXPANDING IMPLIED IMMUNITY TO THE TYING AND LADDERING CLAIMS.

Petitioners offer dicta in *Trinko* to justify extending implied immunity to the tying and laddering here. Petitioners claim that "this Court endorsed a cost-benefit calculus" that provides guidance for the claimed immunity from the antitrust laws presented here. Pet. Br. at 26. However, the issue of implied immunity was not presented in *Trinko* because of an "antitrust-specific saving clause". *Trinko*, 540 U.S. at 406. Rather, the question before the Court was "whether the allegations of [Trinko's] complaint fit within existing exceptions [to the general rule that competitors have no duty to cooperate with rivals] or provide a basis, under traditional antitrust principles, for recognizing a new one." *Id.* at 408. This Court held that the allegations did not fit within any of the existing exceptions to the general rule and declined to create a new exception.

To be sure, in reaching its conclusion the Court weighed what it termed a "realistic assessment" of the antitrust laws with the benefits of antitrust intervention. *Id.* at 414. However, this type of analysis "is unrelated to existing Section 2 jurisprudence and highlights just how narrow the scope is for the future application and the decision rule in Trinko." Jonathan L. Rubin, *The Truth About Trinko*, 50 ANTITRUST BULLETIN 725 (2005). The suggested analytical approach in *Trinko*, is not a traditional implied immunity analysis. It neither recognizes the primacy of the policy favoring competition at the heart of

this Court's implied immunities jurisprudence nor reconciles the policies of the antitrust laws with those of the regulatory scheme. *Silver*, 373 U.S. at 357.

IV. THIS COURT SHOULD NOT IMPOSE A HEIGHTENED PLEADING STANDARD.

Absent Congressional action to amend Federal Rule of Civil Procedure 8, this Court consistently has rejected attempts – like those proposed by petitioners and several amici here – to impose a heightened pleading standard for specific types of cases because of the specific nature of the claim or defense. *See, e.g., Jones*, 127 S.Ct. at 919-20 (stating that "[s]pecific pleading requirements are mandated by the Federal Rules of Civil Procedure, and not, as a general rule, through case-by-case determinations of the federal courts," *quoting Hill v. McDonough*, 547 U.S. ___, 126 S.Ct. 2096 (2006) (slip op., at 8) (citing *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506 (2002))).[6]

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[6] In a consistent line of decisions spanning many years, this Court has repeatedly rejected attempts to modify Rule 8 by judicial decision across a variety of claims and affirmative defenses. *See Jones*, 127 S.Ct. at 921-22 (concluding that failure to exhaust is an affirmative defense under the PLRA, and that inmates are not required to specially plead or demonstrate exhaustion in their complaints); *Hill*, 547 U.S. ___ (slip op. at 8) (rejecting a proposal that 42 U.S.C. § 1983 suits challenging a method of execution must identify an acceptable alternative); *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 515 (2002) (reversing court of appeals for requiring employment discrimination plaintiffs to specifically allege the elements of a prima facie case of discrimination and explaining that "'the Federal Rules do not contain a heightened pleading standard for employment discrimination suits,'" and a "'requirement of greater specificity for particular claims'" must be obtained by amending the Federal Rules); *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163, 168 (1993) (unanimously reversing court of appeals for imposing a heightened

(Continued on following page)

There is no justification for a heightened pleading standard for antitrust claims; and there is certainly no justification for a heightened standard to plead around an affirmative defense, which is what petitioners and amici want here. Both *Jones* and *Leatherman* are instructive. In both cases, the arguments for heightened pleading standards involved pleading the absence of affirmative defenses. *See Jones*, 127 S.Ct. at 921 (concluding that "failure to exhaust is an affirmative defense under the PLRA, and that inmates are not required to specially plead or demonstrate exhaustion in their complaints"); *Leatherman*, 507 U.S. at 167 (rejecting the Fifth Circuit's conclusion that "'[i]n cases against governmental officials involving the likely defense of immunity we require of trial judges that they demand that the plaintiff's complaints state with factual detail and particularity the basis for the claim which necessarily includes why the defendant-official cannot successfully maintain the defense of immunity,'" *quoting Elliott v. Perez*, 751 F.2d 1472, 1473 (5th Cir. 1985) (*rev'd*, 507 U.S. 163)).

Here, as in both *Jones* and *Leatherman*, petitioners and amici would require respondents to amend their pleadings to demonstrate why the affirmative defense of implied immunity does not apply.[7] In an attempt to demonstrate the

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pleading standard in § 1983 suits against municipalities concluding that "'that is a result which must be obtained by the process of amending the Federal Rules, and not by judicial interpretation.'").

[7] The fact that implied immunity constitutes an affirmative defense cannot be seriously challenged. As the Second Circuit recently recognized in a similar antitrust case, "most immunities are affirmative defenses." *See, e.g., In re Stock Exchanges Options Trading Antitrust Litig.*, 317 F.3d 134, 151 (2d Cir. 2003) (*citing Gomez v. Toledo*, 446 U.S. 635, 640 (1980) (qualified immunity for a public official); *Murphy v. Waterfront Comm'n of New York Harbor*, 378 U.S. 52, 104 (1964)

(Continued on following page)

need for a heightened pleading standard, petitioners and amici criticize respondents' complaints for containing only "vague and conclusory allegations," United States Amicus Br. at 24, attempt to distinguish the importance of the allegations based on their placement within the Complaint, *id.* at 26, and assume that the complaint seeks to impose liability based on allegations of potentially immune conduct. *Id.* at 25. But nothing in Rule 8 requires a complaint to be "ordered" in any specific fashion nor does the rule prohibit background information to put the allegations of illegal conduct in context.

Forcing respondents to re-plead to avoid allegations of conduct that may be implicitly immune imposes a heightened pleading standard requiring respondents to plead facts demonstrating that the affirmative defense of immunity does not apply to their antitrust claims. Such a requirement conflicts with the undeviating line of cases culminating in the *Jones* decision announced just last month. What petitioners and amici ask for "is a result which must be obtained by the process of amending the Federal Rules, and not by judicial interpretation." *Leatherman,* 507 U.S. at 168. This Court should leave the matter to the lower courts to "rely on summary judgment

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(White, J., concurring) (absolute immunity); *Troxler v. Owens-Illinois, Inc.*, 717 F.2d 530, 532-33 (11th Cir. 1983) (statutory immunity); 2 MOORE'S FEDERAL PRACTICE § 8.07[5] (3d ed. 1999) ("In addition to the 19 affirmative defenses set forth [in Fed.R.Civ.P.] 8(c)[, that Rule] requires 'any other matter constituting an avoidance or an affirmative defense' to be pleaded. Affirmative defenses and avoidances other than those specifically referenced [in Rule 8(c)] have been found to include common law immunity, statutory immunity, [and] exemption under a statute or regulation. . . . ") (footnotes omitted).

and control of discovery to weed out unmeritorious claims sooner rather than later." *Id.* at 169.

V. THIS COURT SHOULD NOT ESTABLISH A CATEGORICAL RULE BARRING USE OF IMMUNIZED CONDUCT AS EVIDENCE AT TRIAL OF NON-IMMUNIZED CONDUCT.

Petitioners and amici ask this Court to establish a categorical rule prohibiting the introduction of evidence of authorized conduct from which the jury could infer unauthorized behavior, not immunized under the antitrust laws. Pet. Br. at 48-49; United States Amicus Br. at 23-29. For example, the Second Circuit found stabilization activities and collaborative underwriting to be immunized from the antitrust laws because they were specifically permitted by regulation. *Billing*, 426 F.3d at 10-12. The petitioners and amici apparently would have this Court prohibit introduction of evidence related to meetings of the underwriting syndicate or of the road show meetings, even if that testimony would allow a jury to determine that those meetings provided an opportunity to collude on tie-ins or laddering or would facilitate the policing of the conspiracy. Pet. Br. at 48-49; United States Amicus Br. at 23-29.

Any categorical prohibition would be contrary to this Court's longstanding jurisprudence that conduct that might otherwise be subject to immunity can still constitute part of the evidence admitted, within the discretion of the trial court, on a motion or at trial. *See United Mine Workers,* 381 U.S. at 670 (stating that although "[j]oint efforts to influence public officials do not violate the antitrust laws even though intended to eliminate competition." Evidence of such immune conduct could be admitted

within the discretion of the trial court, "if it tends reasonably to show the purpose and character of the particular transactions under scrutiny." *Id.* at 670 n.3 (quotation and citations omitted); *see also Nicks v. State of Missouri*, 67 F.3d 699, 702 (8th Cir. 1995) (admitting evidence arguably immune under "qualified immunity doctrine" because a district court has broad discretion to admit or exclude evidence) (citations omitted); *Cipollone v. Liggett Group, Inc.*, 668 F. Supp. 408, 410-11 (D.N.J. 1987) (observing that the Supreme Court has made plain that even if such evidence of prior or subsequent transactions are barred from forming the basis for a suit, it may nevertheless be introduced if it reasonably tends to show the purpose and character of the particular transactions under scrutiny) (citations omitted); *Sonitrol v. American Tel. and Tel.*, 629 F. Supp. 1089, 1101 (D.D.C. 1986) (holding that although "these rates cannot themselves be used as bases of antitrust liability given the application of the state action immunity doctrine to defendants' anticompetitive conduct," it would of course still be "within the province of the [Court] to admit this evidence, if [it] deemed it probative and not unduly prejudicial, under the established judicial rule of evidence that testimony of prior or subsequent transactions, which for some reason are barred from forming the basis for a suit, may nevertheless be introduced if it tends reasonably to show the purpose of the particular transactions under scrutiny") (citations omitted).

There is no reason in this case to depart from long-standing and well-established precedent to create a categorical rule for implied immunity cases. Allegations that petitioners met and discussed appropriate topics about the IPOs at issue should not be precluded if respondents properly allege that, at these meetings, petitioners

also agreed to illegal tying and laddering. The facts that these meetings may have facilitated illegal agreements, made policing those illegal agreements possible and demonstrated petitioners' motive or opportunity to effectuate those illegal agreements are probative evidence relating to petitioners' scheme that sets the background, opportunity and incentive to put respondents' other allegations in a proper context. The district court is well armed by the Rules of Evidence, adequate decisional law and the discretion it provides, to manage the evidentiary issues that this case may present. Nothing more is required and, adopting any preconceived standard for implied immunity cases would be akin to adopting the heightened pleading standard urged by petitioners and amici. As with the pleading rules, any suggestion that the Court should alter the Rules of Evidence or their application on a case by case basis contradicts established law. *E.g., United Mine Workers,* 381 U.S. at 670 n.3.

CONCLUSION

For all the above reasons, the American Antitrust Institute, as amicus curiae, respectfully requests this Court to affirm the decision of the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

JOSEPH GOLDBERG
Counsel of Record
MATTHEW L. GARCIA
FREEDMAN BOYD DANIELS
HOLLANDER GOLDBERG & IVES, P.A.
20 First Plaza, Suite 700
Albuquerque, NM 87102
(505) 842-9960

DANIEL E. GUSTAFSON
GUSTAFSON GLUEK PLLC
650 Northstar East
608 Second Avenue South
Minneapolis, MN 55402
(612) 333-8844

DARREN BUSH, PH.D.
Assistant Professor of Law
UNIVERSITY OF HOUSTON LAW CENTER
100 Law Center
Houston, TX 77204
(713) 743-3346

Counsel for Amicus Curiae

395 D

No. 05-1157

IN THE

Supreme Court of the United States

CREDIT SUISSE SECURITIES (USA) LLC,
fka CREDIT SUISSE FIRST BOSTON LLC, *et al.*,

Petitioners,

v.

GLEN BILLING, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE STATE OF NEW YORK AS AMICUS CURIAE SUPPORTING RESPONDENTS

ANDREW M. CUOMO
Attorney General of the State of New York
BARBARA D. UNDERWOOD*
Solicitor General
DANIEL SMIRLOCK
Deputy Solicitor General
ANDREW D. BING
Assistant Solicitor General
120 Broadway, 25th Floor
New York, New York 10271
(212) 416-8020

RICHARD E. GRIMM
Director of Enforcement
Antitrust Bureau

SARAH M. HUBBARD
Assistant Attorney General
Antitrust Bureau

* *Counsel of Record*

Counsel for Amicus Curiae
State of New York

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Silver v. New York Stock Exch.,
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United States v. Nat'l Ass'n of Sec. Dealers, Inc.,
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United States Constitution:

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INTEREST OF THE AMICUS CURIAE

New York City is a global commercial center and home to major securities markets. The State of New York and the New York Attorney General have a strong interest in the orderly functioning of the markets that are essential to the State's financial well-being. In this connection, New York has a particular interest in the enforcement of both the antitrust laws that protect and promote competition and the securities laws that protect the integrity of the securities market, and in the appropriate harmonization of both regulatory regimes.

The Attorney General is authorized to enforce the federal antitrust laws, both to redress violations that injure the State and its political subdivisions, and in his capacity as *parens patriae* on behalf of New York's citizens. 15 U.S.C. § 15c (2000); *see also Hawaii v. Standard Oil Co.*, 405 U.S. 251, 257-60 (1972). The Attorney General is also the primary public enforcer of the State's own antitrust laws, which generally conform to federal law.[1] *See X.L.O. Concrete Corp. v. Rivergate Corp.*, 634 N.E. 2d 158, 161 (N.Y. 1994); *see generally California v. ARC America Corp.*, 490 U.S. 93, 101-03 (1989) (Congress accords special deference to state antitrust laws, which are not preempted even by inconsistent federal antitrust principles). The blanket antitrust immunity that petitioners urge for initial public offering ("IPO") transactions would compromise the Attorney General's ability to redress harms suffered by public and private investors, businesses and the State.

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1. The Attorney General represents the state and acts "in the name and in behalf of the people" in antitrust actions to secure injunctive relief and civil penalties, N.Y. Gen. Bus. Law §§ 342, 342-a (McKinney 2004), and has broad investigatory powers and exclusive authority to bring state criminal antitrust actions. *Id.*, §§ 343, 347.

New York's Attorney General also recognizes the importance of protecting the integrity of the securities regulatory system, and indeed he enforces New York's Martin Act, N.Y. Gen. Bus. Law § 352 (McKinney 1996), "which grants [the Attorney General] both regulatory and remedial powers aimed at detecting, preventing and stopping fraudulent securities practices." *Kralik v. 239 E. 79th St. Owners Corp.*, 832 N.E. 2d 707, 709 (N.Y. 2005). However, applying both the antitrust laws and securities law to the anticompetitive conduct alleged in this case would enhance rather than impair the effectiveness of the securities laws. The aftermarket price-boosting scheme alleged by plaintiffs is prohibited by both legal regimes. Thus, there is no conflict requiring the ouster of antitrust remedies.

SUMMARY OF ARGUMENT

This Court should affirm the Second Circuit's rejection of implied antitrust immunity here. There is no "convincing showing of clear repugnancy between antitrust laws and the [SEC's] regulatory system" in this case warranting an implied repeal of antitrust laws. *See National Gerimedical Hospital and Gerontology Ctr. v. Blue Cross of Kansas City*, 452 U.S. 378, 388 (1981). To the contrary, the conduct challenged as anticompetitive in this case has been consistently prohibited by both the antitrust laws and the SEC's regulatory scheme. As both the district court and the Second Circuit found, the gravamen of the Consolidated Amended Class Action Complaint ("Complaint") is petitioners' alleged conspiracy to inflate the aftermarket prices of IPO shares by imposing anticompetitive charges, as well as engaging in impermissible aftermarket "laddering" and "tie-in" arrangements. The SEC has never permitted these anticompetitive activities and lacks the statutory authority to do so. Indeed, the SEC's regulation specifically prohibits the very agreements alleged by respondents.

Moreover, there is no basis in law or reason for the blanket antitrust immunity that petitioners seek, and their arguments supporting immunity are not persuasive. First, immunity is not required by this Court's decision in *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004). Second, contrary to the suggestion of the United States as amicus curiae, the core conduct alleged here – conspiracy to manipulate IPO aftermarket prices – is not "inextricably intertwined" with collaborative activities that are otherwise authorized by the securities laws. Based on the faulty premise that it is, the United States proposes a heightened pleading standard that would permit securities industry participants to violate the antitrust laws with impunity as long as the violation occurs in connection with otherwise lawful conduct.

Third, if, as petitioners contend, the allegations in the Complaint are overbroad, that would not justify the blanket antitrust immunity they seek here. As the court of appeals concluded, the district court has ample tools available to assure that petitioners are not prejudiced by evidence of the lawful underwriter conduct that allegedly formed the backdrop for the conspiracy. Alternatively, if this Court were to conclude that the district court cannot provide such assurance, the appropriate remedy would not be to immunize the entire IPO aftermarket process from antitrust scrutiny. Instead, the remedy would be to remand the case with directions to the district court to remove from the Complaint any suggestion that respondents are alleging that collaborative activities authorized under the securities laws are illegal under the antitrust laws, and to permit respondents to clarify that these activities merely formed the backdrop for the alleged unlawful aftermarket price-boosting schemes. A blanket immunity from the antitrust laws would be an overbroad remedy for any concern about the possible abuse of private treble damage actions, because it would unnecessarily and inappropriately impair the State's power to protect its citizens from anticompetitive conduct.

Finally, petitioners are mistaken in suggesting that the Second Circuit's decision, which preserves the legal standard that has been in place since Congress adopted the Sherman Act in 1890, poses a new threat to this country's capital markets. The court's denial of implied antitrust immunity is not new, but instead is supported by both reason and long-standing precedent. Moreover, if there has been any decline in the vitality of this country's capital markets, petitioners have made no showing that it is attributable to the availability of antitrust remedies. Congress, not the courts, is the proper forum for petitioners' unfounded claim that all IPO-related conduct should be immunized from the antitrust laws in order to preserve the primacy of the United States capital markets.

ARGUMENT

I. IMPLIED ANTITRUST IMMUNITY IS INAPPROPRIATE IN THIS CASE BECAUSE THERE IS NO "CLEAR REPUGNANCY" BETWEEN THE ANTITRUST LAWS AND THE SEC'S REGULATORY SCHEME

A. The "Clear Repugnancy" Standard Requires Actual Or Potential Conflict Between Antitrust Law and the Regulatory Regime.

This Court has held that "[t]he Securities Exchange Act contains no express exemption from the antitrust laws or, for that matter, from any other statute. This means that any repealer of the antitrust laws must be discerned as a matter of implication, and it is a cardinal principle of construction that repeals by implication are not favored." *Silver v. New York Stock Exch.*, 373 U.S. 341, 357 (1963) (citations and internal quotations omitted). Because "[i]mplied antitrust immunity is not favored," it can be justified "only by a convincing showing of clear repugnancy between the antitrust laws and the regulatory system." *United States v. Nat'l Ass'n of Sec. Dealers, Inc.*, 422 U.S. 694, 719 (1975) (*"NASD"*); *accord National Gerimedical Hospital*, 452 U.S. at 388. Even

where the required clear repugnancy is found, repeal "is to be regarded as implied . . . only to the minimum extent necessary." *Silver*, 373 U.S. at 357. Thus, "the proper approach" is one that, where possible, "reconciles the operation of both statutory schemes with one another rather than holding one completely ousted." *Id.*

Accordingly, mere overlap between the antitrust laws and a regulatory scheme is insufficient to imply antitrust repeal. *See NASD*, 422 U.S. at 734 (immunity has been implied "in particular and discrete instances"). Although this Court has weighed "the question of the pervasiveness of the regulatory scheme as a factor in determining whether there is an implied repeal of the antitrust laws," *see Gordon v. New York Stock Exchange, Inc.*, 422 U.S. 659, 688 (1975), it has never relied on that ground alone to create blanket antitrust immunity for regulated industries. *Cf. Silver*, 373 U.S. at 360-61 ("the statutory scheme of the [Securities Exchange Act] is not sufficiently pervasive to create a total exemption from the antitrust laws"). "Even when an industry is regulated substantially, this does not necessarily evidence an intent to repeal the antitrust laws with respect to every action taken within the industry." *National Gerimedical Hospital*, 452 U.S. at 389 (citations omitted).[2]

The "clear repugnancy" required for implied repeal can result only from an "actual" or "potential" conflict between the two bodies of law. A conflict that supports a finding of

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2. As leading antitrust commentators state, the preferred view "leads to a particularized inquiry into the intensity and nature of agency scrutiny over the challenged practice. It avoids finding broad areas of immunity or repeal and concentrates instead on an independent appraisal of the necessity or reasonableness of the challenged conduct." Philip Areeda and Herbert Hovenkamp, *Antitrust Law* ¶ 243d at 319 (3d ed. 2006) ("*Antitrust Law*"); *see also ABA Antitrust Law Developments* 1240 (5th ed. 2002) ("The implication of repeal will be limited to the activity challenged and will not extend to other conduct regulated by the same agency.").

implied antitrust repeal may arise when the antitrust laws would bar an action that the regulatory scheme permits, or the regulatory agency has jurisdiction over the challenged conduct but has deliberately chosen not to regulate it or the agency has the authority to permit, and has in fact permitted in the past, conduct that it currently prohibits. *See Gordon*, 422 U.S. at 690-91; *see also National Gerimedical Hospital*, 452 U.S. at 389 ("[i]ntent to repeal the antitrust laws is much clearer when a regulatory agency has been empowered to authorize or require the type of conduct under antitrust challenge"); *NASD*, 422 U.S. at 722 (immunity found because there is "no way to reconcile the Commission's power to authorize [the challenged] restrictions with the competing mandate of the antitrust laws"). Accordingly, where both the antitrust laws and the regulatory scheme consistently prohibit the challenged conduct, antitrust immunity is inappropriate.

B. No Actual or Potential Conflict Exists Because the Alleged Price-Boosting Scheme Is Prohibited by the Securities Laws, and the SEC Has No Power to Permit It.

1. No actual conflict prevents the application of the antitrust laws to the alleged scheme.

There can be no "clear repugnancy" in this case because there is no conflict between antitrust enforcement and securities regulation. Respondents here allege that petitioners colluded to inflate the prices of securities in the IPO aftermarket. The anticompetitive practices alleged include a conspiracy to impose on IPO customers "consideration in addition to the underwriters' discount;" additional, unauthorized charges; and obligations to make follow-up stock purchases (Compl. at ¶¶ 1, 4, 6). Petitioners allegedly agreed "to require that, in order to obtain IPO shares of a Class Security, customers had to place bids for and/or purchase quantities of such Class Security in the aftermarket at prices above the IPO price in order to systematically and

significantly inflate the after-market prices of IPOs – a practice known as 'laddering'" (*id.* ¶¶ 4, 7). The Complaint also alleges that petitioners "abused the preexisting practice of combining into underwriting syndicates by implementing the unlawful agreement alleged . . . through such syndicates" (*id.* ¶ 5). Respondents were allegedly injured by paying "the anticompetitive charges and inflated aftermarket prices," (*id.* ¶ 9)– which averaged 60 percent over the issue price on just the first trading day (*id.* ¶ 8).

Liberally construed, the Complaint charges either upward price-fixing or, at least, horizontal and vertical collusion involving securities industry competitors that had the purpose and effect of raising open-market prices. The SEC has consistently prohibited such price-boosting schemes. SEC's Regulation M, 17 C.F.R. Part 242, prohibits "the very tie-in, laddering and other aftermarket agreements alleged by the Sherman Act Plaintiffs." *In re Initial Public Offering Antitrust Litigation*, 287 F. Supp. 2d 497, 515 (S.D.N.Y. 2003) ("*In re IPO*"), *vacated and remanded sub. nom. Billing v. Credit Suisse First Boston Ltd.*, 426 F.3d 130 (2d Cir. 2005) ("*Billing*").[3] In fact, the SEC has had a "consistent [negative] view of this conduct" since at least 1961 – more than 40 years. *Id.* SEC Bulletin 10, "Prohibited Solicitations and 'Tie-in' Agreements for Aftermarket Purchases," makes clear that the SEC considers tying IPO allocations to later open-market purchases as an "egregious" form of solicitation, and that this conduct may also violate the anti-manipulation provisions of the Exchange Act, former Rule 10(b)(6) and other laws. SEC Div. of Market Regulation, Staff Legal Bulletin No. 10: *Prohibited Solicitations and "Tie-in"*

3. Regulation M, the district court noted, prohibits aftermarket stabilization, except in certain circumstances "for the purpose of preventing or retarding a decline in the market price." *In re IPO*, 287 F. Supp. 2d at 515. In this case, by contrast, the alleged scheme was not designed to promote stability, but rather was pursued to artificially increase prices.

Agreements for Aftermarket Purchases ¶ 2 (Aug. 25, 2000). Similarly, the SEC noted in a 1984 report that "[the practice of tie-in agreements and laddering] violates the anti-fraud and anti-manipulative provisions of the federal securities laws." Report Of The Securities and Exchange Commission Concerning The Hot Issues Markets, quoted in *Billing*, 426 F.3d at 143.

Indeed, the securities statutes themselves prohibit the blatant upward price manipulation alleged here. The alleged laddering and other related price-boosting conduct fall within the prohibitions of Section 17 of the Securities Act, 15 U.S.C. § 77q (2000) ("Fraudulent Interstate Transactions"), Sections 9(a)(1) - (5) of the Exchange Act, 15 U.S.C. § 78i(a)(1)-(5) (2000) ("Manipulation of Security Prices") and Section 15(c)(1) of the Exchange Act, 15 U.S.C. § 78o(c)(1) (2000) ("Use of Manipulative or Deceptive Devices; Contravention of Rules and Regulations"). For example, the SEC has found that Section 17 of the Securities Act prohibits an underwriter from requiring laddering or tie-ins or from manipulating prices above the IPO prices. *See, e.g., In the Matter of The Stuart James Co., Inc.*, Fed. Sec. L. Rep. (CCH) ¶ 85,129 at 84,089 (March 17, 1993); *see also In the Matter of Robert Francis Catoggio*, 60 S.E.C. Docket 630, 1995 WL 560217 (Sept. 21, 1995) (manipulation of aftermarket prices constituted violations of Section 17(a) of the Securities Act and Section 15(c)(1) of the Exchange Act). Similarly, Sections 9(a)(1) - (5) of the Exchange Act specifically forbid manipulation and do not provide for SEC rulemaking; that is, these sections prohibit outright conspiracies to raise IPO prices.

Consequently, the SEC is not authorized to permit open-market price-boosting conspiracies. Although Section 9(a)(6) of the Exchange Act, 15 U.S.C. § 78i(a)(6) (2000), gives the SEC rulemaking powers to permit conduct designed to stabilize the price of a security, and although SEC Regulation M permits aftermarket price stabilization "for the purpose

of preventing or retarding a decline in the market price," the rulemaking power does not extend to conduct designed to increase prices rather than retard their decline. *See In re IPO*, 287 F. Supp. 2d at 515.

Because SEC authorizing statutes and regulations prohibit the alleged anticompetitive practices — indeed, petitioners and the United States have not pointed to any statute or regulation suggesting the contrary – applying the antitrust laws would not be "clearly repugnant" to the SEC's regulatory scheme. *National Gerimedical Hospital*, 452 U.S. at 388; *see also Antitrust Law* ¶ 243e3 at 335 ("Clearly no 'repugnancy' exists between a regulatory regime and antitrust policy where enforcing the latter would support the former").[4] Implied antitrust immunity is therefore inappropriate in this case.

2. There is no potential conflict between the antitrust laws and the SEC's regulation of the IPO process.

This Court has no reason to adopt the position of the district court below, which found implied immunity by reason of the SEC's "pervasive" authority over the IPO process. Pet Br. at 32-33. According to the district court, "it is clear that the SEC, both directly and through its pervasive oversight of the NASD and other [self regulatory organizations], either expressly permits the conduct alleged in the . . . Complaint

4. Neither Section 28 of the Securities Act, which permits the SEC to exempt by rule or regulation "any person, security, or transaction, or any class or classes of persons, securities or transactions, from any provision or provisions of [the Securities Act]," 15 U.S.C. § 77z-3 (2000), nor the exemptive provision in Section 36 of the Exchange Act, 15 U.S.C. § 78mm (2000), in any way gives the SEC the authority to permit across-the-board collusive price-boosting schemes that are clearly prohibited by the anti-fraud and anti-manipulation provisions of the securities laws. Moreover, even if the SEC had such authority, there is little likelihood that it would ever exercise it to authorize the conduct alleged here.

or has the power to regulate the conduct." *In re IPO*, 287 F. Supp. 2d at 523. Indeed, the district court devoted much attention to describing the "pervasive" aspects of the SEC's IPO regulation, the SEC's power to regulate IPOs, and the legality of the syndicate system. It found that if certain permitted practices, such as underwriting syndicates, road shows, syndicate member communications about securities purchases, collection of buyer indications of interest, and market-making activity, were subject to antitrust challenge, then there would be a "plain repugnancy" between the two bodies of law. *Id.* at 506-10.

But respondents are not claiming that underwriting syndicates or any other of these practices is illegal. As the district court itself found, the "gravamen" of the Complaint is defendants' alleged conspiracy to inflate the aftermarket prices through impermissible aftermarket laddering, tie-in and other arrangements. *Id.* at 499; *see also Billing*, 426 F.3d at 146 (identifying the legitimate activities alleged in the complaint, like the use of syndicates and the road show process, as "background conduct"). Unlike the lawful IPO practices described above, open market upward price manipulation practices are, and have always been, prohibited.

That the challenged laddering practices occurred in connection with IPO activities that are themselves pervasively regulated does not require immunity. A regulatory scheme's pervasiveness does not by itself create a "plain repugnancy" between the regulatory scheme and the antitrust laws. *See Antitrust Law* ¶ 243e2 at 326 (a regulatory scheme's "pervasiveness" "in the abstract is minimally relevant and never dispositive"). This Court's holding in *NASD* demonstrates this point. As the court of appeals explained below, this Court's grant of immunity for the alleged horizontal restraints in *NASD* on the ground of "pervasive regulation" was derivative. *Billing*, 426 F.3d at 161. The Court first determined that the underlying vertical restraints

imposed by the horizontal agreements were immune from the antitrust laws because they had been "consistently approved by the SEC." *Id.* at 161, citing *NASD*, 422 U.S. at 733. The "plain repugnancy" standard was satisfied because "[t]he purpose of the challenged conspiracy actually coincided with the aims of the SEC." *Billing*, 426 F.3d at 161. Thus, "after the Court determined that the underlying restraints on the secondary market were immune it could then conclude that conduct enforcing those restraints was also immune." *Id.* Accordingly, *NASD* did not hold that antitrust immunity applies to all anticompetitive conduct in the pervasively regulated securities industry even where there is no conflict between the antitrust laws and the regulatory regime.

Here, the SEC has no statutory authority to approve the open-market price-boosting schemes challenged, and, given the pernicious nature of the practices, Congress is unlikely to give it the authority to do so. Indeed, neither the amicus briefs filed below in this matter nor the amicus brief of the United States here claims that the SEC has the authority to permit the collusive price-boosting conduct alleged here. Thus, there is simply no possibility that the two bodies of law would conflict as to this alleged conduct. There is no need to replace the antitrust laws in order to make the securities regulatory system work. *See Gordon*, 422 U.S. at 690-91 (antitrust immunity found regarding fixing of commission rates; although the practice was actually prohibited by both the securities laws and antitrust laws by the time the case was heard, the SEC had the statutory authority to permit the conduct in the future should it choose to do so). In contrast, in this case there is no statutory or regulatory authority, legislative history, or past regulatory activity indicating that aftermarket price-fixing conspiracies might be permitted by the SEC in the future.

II. THERE IS NO BASIS IN LAW OR REASON FOR THE BLANKET ANTITRUST IMMUNITY PETITIONERS SEEK

A. This Court's Decision in *Trinko* Does Not Support Implied Immunity Here.

Quoting this Court's decision in *Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004), petitioners argue for a broad antitrust immunity because "when 'a regulatory structure designed to deter and remedy anticompetitive harm,' such as the securities laws, is in place, 'the additional benefit to competition provided by antitrust enforcement' is 'small.'" Pet. Br. at 27 (quoting *Trinko*, 540 U.S. at 412). Petitioners' out-of-context quotations from *Trinko* do not support a finding of implied immunity here.

In *Trinko*, plaintiffs asserted a claim under section 2 of the Sherman Act, 15 U.S.C. § 2 (Supp. IV 2004), based on Verizon's alleged refusal to aid local phone service competitors by sharing its facilities with them, as required by the Telecommunications Act of 1996, Pub. L. 104-104, 110 Stat. 56. *See Trinko*, 540 U.S. at 401. Importantly, the case did not involve implied immunity, because Congress had expressly preserved the application of the antitrust laws in the 1996 Act. *See id.* at 405-07. Instead, the question before the Court in *Trinko* was whether Verizon's failure to comply with the 1996 Act's mandate that it share facilities with competitors also violated the antitrust laws. *See id.* at 407.

In finding no antitrust violation, the Court explained that there is generally no obligation under the antitrust laws to aid competitors and that the obligations imposed under the 1996 Act went beyond the antitrust law mandate. *See id.* at 408, 415. The Court observed that its decision in *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985), had recognized a limited exception to the no-duty-to-aid rule.

However, the Court distinguished the facts of *Aspen Skiing*, noting that there, defendant had terminated a prior course of dealing with plaintiff and refused to reinstate it even at retail rates, suggesting that the refusal to deal was intended to reduce competition. *Trinko*, 540 U.S. at 409.

The language in *Trinko* quoted by petitioners was part of the Court's explanation for its rejection of the argument that it should expand the reach of the Sherman Act by recognizing a new exception to the general rule that refusals to aid competitors do not violate the antitrust laws. The Court simply noted that the regulatory regime under the 1996 Act "was an effective steward of the antitrust function" because it already required Verizon to aid its local service competitors and provided effective inducements and enforcement mechanisms. *Trinko*, 540 U.S. at 413. But the question in *Trinko* — whether the Court should expand the antitrust laws to reach conduct that did not violate them — is far different from the question here, which is whether Congress impliedly exempted otherwise unlawful IPO aftermarket price-boosting conduct from antitrust scrutiny when it enacted the securities laws.

Trinko's teachings thus do not apply here. In *Trinko*, it was "less plausible that the antitrust laws contemplate . . . scrutiny" in addition to that provided by the regulatory scheme. *Id.* at 412. Here, in contrast, the alleged price-fixing conduct is a *per se* violation of the Sherman Act under well-established antitrust principles. *See, e.g., Nat'l Collegiate Athletic Ass'n v. Board of Regents*, 468 U.S. 85, 107-08 (1984) ("Restrictions on price and output are the paradigmatic examples of restraints of trade that the Sherman Act was intended to prohibit"). Respondents are asking the Court to apply, not expand, the antitrust laws, and to reject petitioners' argument that *Trinko* allows competitors a free hand to fix prices as long as they do so in a heavily regulated industry.

B. The Core Conduct Alleged Here Is Not "Inextricably Intertwined" With Lawful Collaborative Activities And There Is No Basis For The Pleading Standard Proposed By The United States.

1. The pleading standard proposed by the United States is unwarranted.

In its amicus brief, the United States proposes a vague antitrust immunity standard that does not address the core illegal conduct alleged here, that is inconsistent with this Court's implied immunity precedent, and that could, if expansively interpreted, effectively repeal the antitrust laws in the securities industry and other regulated industries. The United States proposes its new immunity standard because it fears that the threat of treble damages liability based on conduct "inextricably intertwined" with the collaborative activities authorized and regulated by the SEC under the securities laws will "vitiate the immunity for the authorized conduct and thus bring the antitrust laws into conflict with the regulatory scheme." U.S. Br. at 13.

This fear is groundless here. Respondents seek to impose antitrust liability based on allegations of tying, laddering, and other aftermarket price manipulation. These activities are not, and never have been, "inextricably intertwined" with authorized collaborative activities such as underwriting syndicates and road shows. Conspiracies to boost aftermarket prices are not inherent in the IPO syndicate system - even if they are devised at an underwriting meeting or a road show. This is not a case where the alleged illegal activities "cannot practicably be separated" from legal collaboration. *See* U.S. Br. at 15.

The United States mischaracterizes the alleged misconduct as inseparable from authorized collaborative activities, and as a result proposes a heightened pleading

standard that would exempt almost all anticompetitive conduct by securities industry participants from the antitrust laws:

> [Respondents] must allege facts providing concrete notice and giving rise to a reasonably grounded expectation that the alleged antitrust offense can be established without relying on activities that are authorized under the regulatory scheme or inextricably intertwined with such authorized activities.

U.S. Br. at 10. This proposed standard is defective in two respects. First, it rests on the mistaken assumption that the alleged activity in this case is inextricably intertwined with lawful activity. Second, whether or not that assumption is correct, there is no reason to bar all reference to lawful activity as part of the background to an antitrust offense. Such a standard would shield all anticompetitive conduct by underwriters occurring in connection with lawful syndicates, road shows, or other permitted activity. In determining whether antitrust immunity applies, the Court should focus on the "gravamen of the complaint" – here, illegal tying, laddering, and market manipulation – not on whether the context in which illegal activity was perpetrated is itself lawful.

In addition to being unduly vague and expansive, the novel standard urged by the United States is at odds with this Court's decision in *Silver*. That decision rejected a claim of implied immunity where the New York Stock Exchange instructed its members to discontinue private wire connections with Silver's broker-dealer firms without providing notice, a hearing, or any reason for the disconnections. *Silver*, 373 U.S. at 364. This Court acknowledged that the Exchange's self-regulation serves a crucial role in the economy, and that "[r]ules which regulate Exchange members' doing of business with nonmembers in

the over-the-counter market are . . . very much pertinent to the aims of self-regulation under the 1934 Act." *Id.* at 355. Although the Exchange was permitted under the regulatory scheme to instruct member firms to discontinue private wire connections with non-member broker-dealers, the Court held that the Exchange had exceeded the scope of its authority – and the reach of immunity – because it denied necessary procedural safeguards. *Id.* at 364-65. But under the standard proposed here by the United States, the antitrust offense could not have been "established without relying on activities that are authorized under the regulatory scheme." U.S. Br. At 10. Such a standard – unless so narrowly construed that it does not differ from existing law – is at odds not only with *Silver*, but also the entire body of implied immunity jurisprudence.

Finally, the proposed standard is not a necessary or proper remedy for the danger it is designed to meet. The United States speculates that a plaintiff might convince judges or juries to infer an antitrust conspiracy from general "discussions among underwriters in an IPO syndicate" that are permitted by the SEC. U.S. Br. at 15. But as the United States recognizes, the district court can "ensure that petitioners are not prejudiced by virtue of their legitimate conduct" by using its "broad discretion to tailor discovery narrowly and to dictate the sequence of discovery" and by limiting "any use of evidence of protected activity and exclude that evidence when . . . it is irrelevant or unduly prejudicial." U.S. Br. at 28-29 (quotations and internal citations omitted). *See also Billing*, 426 F.3d at 167 n. 47 ("[W]e leave to the district court the task of ensuring that defendants do not suffer prejudice from any evidence of their legitimate activities.") There is no need for this Court to divest trial courts of antitrust jurisdiction in order to guard against unwarranted inferences from authorized conduct.

2. The proper remedy for any overbroad allegations of authorized conduct is to remand with directions to correct the pleadings.

Petitioners and the United States urge implied immunity primarily to avoid the danger that antitrust liability might improperly be founded on the lawful conduct that forms the backdrop for the alleged illegal price-boosting scheme. The remedy does not fit the harm. Had respondents made explicit in the Complaint that they are not alleging that legal activity, like underwriting syndicates, is illegal under the antitrust laws, petitioners' arguments would lose nearly all of their force. Notwithstanding the wording of the Complaint, the courts below recognized that the core illegal conduct alleged is an aftermarket price boosting scheme. If this Court nevertheless concludes that the district court cannot protect petitioners from prejudice arising from respondents' contextual allegations of protected conduct, the Court should remand the case and direct respondents to delete from the Complaint any suggestion that authorized collaborative activity is illegal, and to clarify that such activity is described only as the backdrop against which the petitioners conspired to unlawfully boost prices in the post-IPO open market.[5]

In addition, the blanket antitrust immunity that petitioners assert is an overbroad remedy for any concern about private treble damage actions, because it would unnecessarily impair the State's ability to protect its citizens from anticompetitive behavior related to IPOs. In the Eleventh Amendment context, this Court has recognized an important difference between private suits and governmental suits. Like suits brought by the United States, "[s]uits brought

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5. If the issue here turns on the pleadings, petitioners' proper course is to challenge the pleadings' adequacy, as the defendants have done in *Bell Atl. Corp. v. Twombly*, No. 05-1126 (argued Nov. 27, 2006).

by the [States] require the exercise of political responsibility for each suit" while private suits do not. *Alden v. Maine*, 527 U.S. 706, 756 (1999). Governmental suits are "at the instance and under the control of responsible [government] officers" who are constrained to act in the interest of the people as a whole rather than in pursuit of a private interest. *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 785 (1991). Thus, the State has discretion not to sue when its responsible officers determine that a suit would be unwarranted or not in the State's interest. Unlike a private plaintiff, this Office would weigh, among other factors, the public's interest in the orderly functioning of the securities markets in deciding whether to pursue an antitrust claim such as this one. The Court should not construe the antitrust laws in a manner that destroys the State's authority in its *parens patriae* capacity to obtain redress for clear antitrust violations such as those alleged here.

C. Petitioners' Claim That Antitrust Immunity is Needed to Preserve U.S. Capital Markets Does Not Support Their Proposed Interpretation of the Antitrust Laws.

1. Congress is the proper forum for petitioners' policy arguments.

Petitioners urge the Court broadly to immunize the IPO process from the antitrust laws so as not to undermine capital formation in the United States. *See* Pet. Br. at 37-41. Petitioners assert that denying immunity "exacerbate[s] a growing trend of securities offerings shifting overseas." *Id.* at 21. This claim is properly addressed to Congress and not to this Court. Congress has the power to exempt the securities industry from the operation of antitrust laws in whole or in part, but it has not done so. *See Silver*, 373 U.S. at 357. Likewise, Congress and not this Court is the proper forum to address petitioners' expressed concern about private class actions seeking treble damages. Petitioners' proposal

for judicial rather than legislative relief would eliminate all antitrust enforcement, whether private or governmental, in the capital markets. Congress passed the antitrust laws to promote a free market and to foster a productive economy. It is up to Congress to decide whether and to what extent these goals may be outweighed by the need to preserve the IPO market from antitrust scrutiny.

2. The Second Circuit's decision does not represent a new threat to the capital markets.

Petitioners' concern that the Second Circuit's decision raises a new threat to the capital markets is unfounded. That court's application of the implied immunity doctrine did not break any new ground, but simply applied this Court's implied immunity precedents going back over four decades. The court relied on the "clear repugnancy" standard for implied immunity, noting that repeal of the antitrust laws will be implied

> only if the repeal is necessary to make the regulatory provisions work, *see Silver*, 373 U.S. at 357, "and even then only to the minimum extent necessary," *id. See In re Stock Exchs. Options Trading Antitrust Litig.*, 317 F.3d at 145, 148.

Billing, 426 F.3d at 147. The court of appeals found, from the text of the statutes and its analysis of legislative intent, that there is no plain repugnancy between the antitrust and regulatory provisions here, that Congress did not intend on implied repeal of the antitrust laws, and that repeal is not necessary to make the regulatory provisions work. *Id.* at 169-70.

3. No evidence supports petitioners' claim that antitrust enforcement in the IPO context will undermine capital formation in the United States.

The suggestion that antitrust immunity is essential to the preservation of the American capital markets is wholly unsupported. SEC Commissioner Paul Atkins has written that litigation risks and burdensome regulations have caused a drastic decline in the number of new stock offerings occurring in the United States:

> In 2000, nine of every 10 dollars raised by non-U.S. companies through new stock offerings were raised in the U.S. Last year the reverse was true: nine of every 10 dollars were raised abroad.

Paul Atkins, *A Serious Threat To Our Capital Markets*, Wall Street Journal, June 10, 2006, at A12. He asserts that, if the decision below is permitted to stand, "[c]lass action suits based in antitrust law could be used to dismantle the system that has been developed over the years for getting IPOs efficiently and effectively to the market." *Id.*

These contentions have no evidentiary support. First, the Sherman Antitrust Act was enacted in 1890 and has been construed to apply to U.S. capital markets ever since. *See* Act of July 2, 1890, 26 Stat. 209. In denying immunity, the Second Circuit did not create a new threat to the capital markets, but instead followed its and this Court's decades-old precedent. Existing Second Circuit precedent demonstrates that the court has properly implied antitrust immunity in the securities context when the required "clear repugnancy" is present. *See, e.g., In re Stock Exchs. Options Trading Antitrust Litigation*, 317 F.3d 134 (2d Cir. 2003); *Friedman v. Salomon/Smith Barney, Inc.*, 313 F.3d 796 (2d Cir. 2002); *Finnegan v. Campeau Corp.*, 915 F.2d 824 (2d Cir. 1990). The antitrust laws cannot be blamed for a change

in the markets that occurred in only the last six years. Second, this class action does not aim to dismantle the system for getting IPOs to market. It does not aim to dismantle underwriting syndicates or other authorized collaborative activity. It aims only to dismantle aftermarket price-boosting, which the SEC has long recognized as illegal and which undermines the integrity of our capital markets. The antitrust laws have always applied to the kinds of anticompetitive conduct alleged here that are not permitted by securities regulations. Petitioners offer no proof that their continued application will "devastate America's process of capital formation." Atkins, *supra*.

Furthermore, while petitioners purport to oppose only private class actions, the sweeping doctrinal change they advocate would equally curtail the ability of governmental antitrust enforcers, including the Justice Department and the State Attorneys General, to protect investors and businesses from anticompetitive conduct in the securities industry. Finally, it is not at all clear that an implied repeal of the antitrust laws in the IPO context — laws which seek to preserve competition and a free market — would make the United States more attractive to businesses.

CONCLUSION

The decision of the Second Circuit should be affirmed.

Respectfully submitted,

ANDREW M. CUOMO
Attorney General of the State of New York
BARBARA D. UNDERWOOD*
Solicitor General
DANIEL SMIRLOCK
Deputy Solicitor General
ANDREW D. BING
Assistant Solicitor General
120 Broadway, 25th Floor
New York, New York 10271
(212) 416-8020

RICHARD E. GRIMM
Director of Enforcement
Antitrust Bureau

SARAH M. HUBBARD
Assistant Attorney General
Antitrust Bureau

* *Counsel of Record*

Counsel for Amicus Curiae
State of New York